A R T I C L E S

DISMANTLING ROADBLOCKS TO A SUSTAINABLE TRANSITION

by Jesse Lazarus

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SUMMARY

Green startups play a crucial role in the transition to a sustainable economy, yet there is a gap in the literature about the legal and policy challenges these startups face. This Article seeks to fill that gap through interviews, surveys, and focus groups with senior law firm partners experienced in advising green startups, senior pro bono counsel and staff, chief executive officers of early-stage green startups, and senior staff at nonprofit legal aid groups. The Article identifies two major categories of challenges: substantive, including greenwashing, outdated regulatory frameworks, and insufficient understanding of social enterprise corporate forms; and legal service affordability challenges, including when and what pro bono and discounts to offer green startups. It recommends a comprehensive set of solutions, and argues that adopting them can help accelerate the transition to a sustainable economy to secure our future.

Our future depends on a full transition to a sustainable economy.[1] Entrepreneurs of sustainable startup businesses (green startups[2]) help lead this transition,[3] daring us to reimagine every aspect of the current economic order. Entrepreneurship, however, is no easy task, with approximately 75% of new U.S. businesses in the past couple of decades failing within 15 years of their founding.[4] Sustainable entrepreneurship is even more daunting—much has already been written, for instance, about the significantly greater market challenges and longer pathways to commercial viability for climate technology startups[5] than for more

Author's Note: All views expressed in this Article are solely my own and do not represent those of Wilson Sonsini, any previous employer, or any current or previous client. I have represented, currently am representing, and plan to continue to represent green startups in my professional legal practice, though to be clear, none of the contents of this Article should be taken as legal advice.

I owe a debt of gratitude to Buzz Thompson, for originally suggesting this topic and providing me the opportunity to focus on it under his mentorship as a directed research project at Stanford Law School; and Molly Melius, for her mentorship over the course of the project and detailed feedback thereafter. I also benefitted tremendously from Luciana Herman's advice and feedback on the primary research design and Article promotion and content. Thanks also to Phil Malone and Mike Winn for their feedback on the primary research surveys, Kiran Chawla for her detailed feedback on an early draft, and Bernadette Meyer and the spring 2022 class of the Legal Studies Workshop for their feedback on an early draft. Alex Evelson and Fenella McCluskie both stepped in to help answer my most obscure Bluebook citation questions before I first submitted the Article for publication. I offer my strong appreciation to the ELR—Environmental Law Reporter team for their superb editorial support, and my family and friends for their warm encouragement. Finally, my sincere thanks to all the law firm partners and pro bono counsel and staff, green startup chief executive officers, and senior nonprofit legal aid staff who anonymously participated in the primary research and all else who continue to strive, day in and day out, to build the sustainable economy and secure our future; this Article is for you.

1. The World Wide Fund for Nature defines a "sustainable economy" as one that "provides a good quality of life for people, stays within the limits of the planet and helps keep global warming [(i.e., the climate crisis)] well below the 2°C threshold." World Wide Fund for Nature, *Sustainable Economies*, https://www.wwf.eu/what_we_do/sustainable_economies/ (last visited Nov. 9, 2023). The World Health Organization has also described the climate crisis as "the single biggest health threat facing humanity," noting that the "Intergovernmental Panel on Climate Change (IPCC) has concluded that to avert catastrophic health impacts and prevent millions of climate change-related deaths, the world must limit temperature rise to 1.5°C." *Climate Change*, World Health Org. (Oct. 12, 2023), https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health. In addition to the climate crisis, other critical, environmental threats to humankind that are important for a sustainable economy to address include air pollution and biodiversity loss. *See What Is the Triple Planetary Crisis?*, United Nations Framework Convention on Climate Change (Apr. 13, 2022), https://unfccc.int/blog/what-is-the-triple-planetary-crisis.
2. For the purposes of this Article, the term "green startups" refers to for-profit startup companies where a key focus of their business is the advancement of the sustainable economy. This term encompasses the terms "climate technology startups" and "clean technology startups."
3. *Cf.* Lisa M. LeSage, *Sticky Thickets: Local Regulatory Challenges for Small and Emerging Sustainable Businesses*, 31 W. New Eng. L. Rev. 673, 673 (2009); Caoimhe Ring, *Patent Law and Climate Change: Innovation Policy for a Climate in Crisis*, 35 Harv. J. L. & Tech. 373, 397 n.159 (2021).
4. *See* U.S. Bureau of Labor Statistics, *Table 7. Survival of Private Sector Establishments by Opening Year*, https://www.bls.gov/bdm/us_age_naics_00_table7.txt (last visited Nov. 9, 2023).
5. "Climate technology" can be defined as "technologies that are explicitly focused on reducing greenhouse gas emissions or addressing the impacts of global warming [(i.e., the climate crisis)]." *State of Climate Tech 2022: Overcoming Inertia in Climate Tech Investing*, PwC (Nov. 3, 2022), https://www.

traditional software startups,[6] including an investor landscape ill-suited to support their growth.[7] Yet relatively little has been written about the legal and policy challenges facing green startups that can underlie the market challenges.

This Article aims to fill an important gap in the literature by seeking both to identify some of the most critical legal and policy challenges facing green startups in the United States and to propose potential solutions to these challenges. In particular, it focuses on legal and policy challenges that are either distinct to green startups or more relevant to green startups than to non-green startups. It begins with a discussion of why such a gap needs to be filled in the first place, including a brief literature survey[8] highlighting the dearth of coverage of the topic and why a targeted focus is warranted.

Part II continues by describing the results and significance of original primary research[9] on the topic that includes interviews, surveys, and focus groups with chief executive officers (CEOs) of early-stage green startups, along with senior law firm partners with significant experience advising green startups, law firm pro bono counsel, law firm pro bono staff, and senior directors at nonprofit legal aid groups. Part III offers recommendations, based in significant part on the results of the focus group sessions, for addressing some of the legal and policy challenges for green startups identified in the primary research. Part IV concludes.

I. Why Focus on Green Startups?

Whereas there is at least a small pool of literature covering the legal and policy challenges facing U.S. startups generally,[10] there is a relative dearth of coverage specific to the challenges facing U.S. green startups.[11] Aside from Lisa LeSage's analysis of state and local regulatory obstacles facing small and emerging sustainable businesses, much of which primarily focuses on businesses in Oregon,[12] the existing literature covers only tangential topics, such as substantial discussion of law and policy issues related to green technology,[13] including clean energy innovation[14] and energy storage technology[15] in particular, as well as law and policy issues related to clean energy development.[16] What relevant coverage otherwise exists primarily focuses on green startups globally and in other countries, and offers a more limited examination of legal and policy issues related to the barriers facing green startups.[17]

Yet, in interviews and surveys with 20 law firm partners[18] and green startup CEOs with experience advising and working at, respectively, both green and non-green startups, over 70% agreed that there was a distinction between the most critical legal challenges facing green startups versus those faced by non-green startups, warranting a closer look into this topic.[19] The importance of green

pwc.com/gx/en/services/sustainability/publications/overcoming-inertia-in-climate-tech-investing.html.

6. *See* Hara Wang & Cyril Yee, *Climate Tech's Four Valleys of Death and Why We Must Build a Bridge*, Third Derivative (June 17, 2020), https://www.third-derivative.org/blog/climate-techs-four-valleys-of-death-and-why-we-must-build-a-bridge.
7. *See* Peter Lee, *Enhancing the Innovative Capacity of Venture Capital*, 24 Yale J. L. & Tech. 611, 611 (2022); Henry Behnen et al., *Is Green Technology Stalled at the Starting Line? How Anticompetitive Interests and High Capitalization Costs Are Stunting a Green Tech Boom in the United States*, 4 Landslide 16, 17 (2011); *cf.* Benjamin Gaddy et al., *Venture Capital and Cleantech: The Wrong Model for Clean Energy Innovation* 1 (MIT Energy Initiative, Working Paper No. 2016-06, 2016).
8. For a more in-depth survey of the limited relevant coverage offered by the existing literature, see Appendix 1 below.
9. For primary research methodology, see Appendix 2, available at https://www.elr.info/sites/default/files/files-pdf/Lazarus_App2_online.pdf.
10. *See, e.g.*, Alice Armitage et al., *Startups and Unmet Legal Needs*, 2016 Utah L. Rev. 575 (2016); Lawrence J. Trautman et al., *Some Key Things U.S. Entrepreneurs Need to Know About the Law and Lawyers*, 46 Tex. J. Bus. L. 155 (2016); Jack Wroldsen, *Creative Destructive Legal Conflict: Lawyers as Disruption Framers in Entrepreneurship*, 18 U. Pa. J. Bus. L. 733 (2016); Elizabeth Pollman, *Startup Governance*, 168 U. Pa. L. Rev. 155 (2019).
11. In contrast to the above articles focusing on legal and policy challenges for U.S. startups, numerous searches yielded only one article that was directly on point for U.S. green startups, focusing on one subset of legal challenges—regulatory—facing U.S. green startups, with analysis of specific industry examples limited to the state of Oregon. *See* LeSage, *supra* note 3. *See also* Ring, *supra* note 3, at 397 ("the research on green start-ups is still young").
12. *See* LeSage, *supra* note 3.
13. *See, e.g.*, Ring, *supra* note 3; Behnen et al., *supra* note 7; Jayne Piana, *Diffusion of Green Technology: Patents, Licenses, and Incentives*, 52 Tex. Env't L.J. 37 (2022); Daniel Van Fleet, *Legal Approaches to Promote Technological Solutions to Climate Change*, 7 Duke L. & Tech. Rev. 1 (2008); Samuel E. Cayton, *The "Green Patent Paradox" and Fair Use: The Intellectual Property Solution to Fight Climate Change*, 11 Seattle J. Tech. Env't & Innovation L. 214 (2020).
14. *See, e.g.*, Albert Lin, *Lessons From the Past for Assessing Energy Technologies for the Future*, 61 UCLA L. Rev. 1814 (2014).
15. *See, e.g.*, Chaunceton B. Bird, *Growth and Legal Implications of Energy Storage Technologies*, 2017 Utah L. Rev. Online 33 (2017).
16. *See, e.g.*, Mark L. (Buzz) Belleville, *The Wind Blows in Virginia Too—Deconstructing Legal and Regulatory Barriers to the Development of Onshore, Utility-Scale Wind Energy in Virginia*, 41 Wm. & Mary Env't L. & Pol'y Rev. 151 (2016); Joshua C. Macey & Jackson Salovaara, *Rate Regulation Redux*, 168 U. Pa. L. Rev. 1181 (2020).
17. *See, e.g.*, Maria Urbaniec, Motives and Barriers for Green Entrepreneurship: A Systematic Review, Presentation at Second Academic International Conference on Interdisciplinary Business Studies and Seventh International Conference on Trade, Business, Economics, and Law (Oct. 16-18, 2017), https://www.researchgate.net/profile/Nishu-Ayedee-2/publication/344472968_THE_CONTRIBUTION_OF_DEMOCRATIC_LEADERSHIP_IN_INNOVATIVE/links/5f7aee95299bf1b53e0e4549/THE-CONTRIBUTION-OF-DEMOCRATIC-LEADERSHIP-IN-INNOVATIVE.pdf#page=52; Michael Lenox & Jeffrey York, *Environmental Entrepreneurship*, *in* The Oxford Handbook of Business and The Natural Environment 70 (Pratima Bansal & Andrew J. Hoffman eds., Oxford Academic 2012); Vesela Veleva, *The Role of Entrepreneurs in Advancing Sustainable Lifestyles: Challenges, Impacts, and Future Opportunities*, 28 J. Cleaner Prod. 124658 (2021); Mariusz Sołtysik et al., *Innovation for Sustainable Entrepreneurship: Empirical Evidence From the Bioeconomy Sector in Poland*, 9 Admin. Scis. 50 (2019); Paul Mansberger & Filip Projic, Survival Challenges of Environmental Entrepreneurs (2018) (M.B.A. thesis, Jönköping Univ., International Business School) (available on DiVA Portal repository for publications and student theses for Jönköping University, http://hj.diva-portal.org/smash/record.jsf?pid=diva2%3A1212169&dswid=6595).
18. Including one especially senior pro bono counsel with significant experience advising both green startups and startups more generally. Online Survey with Anonymous, Senior Partners and Pro Bono Counsel, Law Firms (Nov. 2021-Mar. 2022) [hereinafter Lawyer Survey].
19. Online Interview with Anonymous, CEO, Sustainable Materials Startup (Nov. 18, 2021) [hereinafter Sustainable Materials CEO 1 Interview]; Online Interview with Anonymous, Pro Bono Staff and Senior Partner, Law Firm (Nov. 24, 2021) [hereinafter Pro Bono and Lawyer 1 Interview]; Online Interview with Anonymous, Senior Partner, Law Firm (Dec. 6, 2021) [hereinafter Lawyer 2 Interview]; Online Interview with Anonymous, CEO, Sustainable Agric. Startup (Dec. 6, 2021) [hereinafter Sustainable Agric. CEO 2 Interview]; Online Interview with Anonymous, CEO, Sustainable Materials Startup (Dec. 7, 2021) [hereinafter Sustainable Materials CEO 3 Interview]; Online Interview with Anonymous, Senior Partner, Law

startups for addressing the existential threat of the climate crisis and related ecological crises also further justifies a focused analysis on what may be most helpful for addressing these challenges in the green startup context.

II. Research Findings—Two Categories of Challenges

This Article's primary research was conducted in two rounds: a first round with surveys of 15 green startup CEOs or other executive level managers,[20] three law firm partners,[21] and one law firm pro bono counsel[22] and interviews of nine green startup CEOs,[23] three law firm partners,[24] two law firm pro bono staff,[25] and two senior staff at nonprofit legal aid groups[26]; and a second round with one focus group of nine green startup CEOs[27] and one focus group of five law firm partners, two law firm pro bono counsel, and two law firm pro bono staff.[28]

The first round focused primarily on identifying and exploring the "most critical" legal and policy challenges[29] facing green startups,[30] whereas the second round focused primarily on brainstorming solutions to these challenges.[31] In particular, two main categories of legal and policy challenges facing green startups were identified and explored: (1) substantive legal and policy challenges facing green startups; and (2) challenges related to providing green startups with affordable, discounted, and/or pro bono legal help.[32] These two categories are each discussed, in turn, in the sections that follow.[33]

A. *Substantive Legal/Policy Challenges*

The substantive legal and policy challenges that resonated most with the law firm partner and green startup CEO surveyees and interviewees in this Article's first round of primary research are detailed in Table 1 (next page).

1. Greenwashing

> There's a lot of crap out there.
>
> —CEO of green food startup[34]
>
> It's chaos.
>
> —CEO of sustainable agriculture startup[35]
>
> [The] Wild West.
>
> —CEOs of three different green startups[36]

Given the premium that consumers are willing to pay for sustainable products and services[37] and that investors are willing to pay for companies,[38] along with weak U.S. regulation of environmental marketing claims[39] that has allowed greenwashing to become rampant,[40] it is no won-

Firm (Dec. 7, 2021) [hereinafter Lawyer 3 Interview]; Online Survey with Anonymous, CEOs, Green Startups (Nov. 2021-Mar. 2022) [hereinafter CEO Survey]; Lawyer Survey, *supra* note 18.

20. The survey technically included 11 green startup CEOs, one chief product officer, one chief financial officer, one principal, and one executive-level manager. CEO Survey, *supra* note 19.
21. Lawyer Survey, *supra* note 18.
22. *Id*.
23. Sustainable Materials CEO 1 Interview, *supra* note 19; Sustainable Agric. CEO 2 Interview, *supra* note 19; Sustainable Materials CEO 3 Interview, *supra* note 19; Online Interview with Anonymous, CEO, Sustainable Food Startup (Nov. 12, 2021) [hereinafter Sustainable Food CEO Interview]; Online Interview with Anonymous, CEO, Sustainable Transportation Startup (Nov. 15, 2021) [hereinafter Sustainable Transportation CEO Interview]; Online Interview with Anonymous, CEO, Clean Energy Storage Startup (Nov. 22, 2021) [hereinafter Energy Storage CEO 2 Interview]; Online Interview with Anonymous, CEO, Sustainable Materials Startup (Nov. 23, 2021) [hereinafter Sustainable Materials CEO 2 Interview]; Online Interview with Anonymous, CEO, Clean Energy Storage Startup (Nov. 18, 2021) [hereinafter Energy Storage CEO 1 Interview]; Online Interview with Anonymous, CEO, Sustainable Agric. Startup (Nov. 23, 2021) [hereinafter Sustainable Agric. CEO 1 Interview].
24. Pro Bono and Lawyer 1 Interview, *supra* note 19; Lawyer 2 Interview, *supra* note 19; Lawyer 3 Interview, *supra* note 19.
25. Pro Bono and Lawyer 1 Interview, *supra* note 19.
26. Online Interview with Anonymous, Senior Staff, Nonprofit Legal Aid Group (Nov. 18, 2021) [hereinafter Legal Aid Staff 1 Interview; Online Interview with Anonymous, Senior Staff, Nonprofit Legal Aid Group (Dec. 7, 2021) [hereinafter Legal Aid Staff 2 Interview].
27. Focus Group with Anonymous, CEOs, Green Startups (May 5, 2022) [hereinafter CEO Focus Group].
28. Online Focus Group with Anonymous, Senior Partners, Pro Bono Counsel, and Pro Bono Staff, Law Firms (May 6, 2022) [hereinafter Lawyer Focus Group].
29. Although the primary research participants were asked solely about "legal" and not "legal and policy" challenges, in assessing the results of the primary research results, the Article's author determined that such challenges were ultimately better characterized as "legal and policy challenges." For more detail, see Appendix 2, available at https://www.elr.info/sites/default/files/files-pdf/Lazarus_App2_online.pdf.
30. *See* CEO Survey, *supra* note 19; Lawyer Survey, *supra* note 18; Sustainable Materials CEO 1 Interview, *supra* note 19; Sustainable Agric. CEO 2 Interview, *supra* note 19; Sustainable Materials CEO 3 Interview, *supra* note 19; Sustainable Food CEO Interview, *supra* note 23; Sustainable Transportation CEO Interview, *supra* note 23; Energy Storage CEO 2 Interview, *supra* note 23; Sustainable Materials CEO 2 Interview, *supra* note 23; Energy Storage CEO 1 Interview, *supra* note 23; Sustainable Agric. CEO 1 Interview, *supra* note 23; Pro Bono and Lawyer 1 Interview, *supra* note 19; Lawyer 2 Interview, *supra* note 19; Lawyer 3 Interview, *supra* note 19; Legal Aid Staff 1 Interview, *supra* note 26; Legal Aid Staff 2 Interview, *supra* note 26.
31. *See* CEO Focus Group, *supra* note 27; Lawyer Focus Group, *supra* note 28.
32. This theme was originally identified as primarily about providing green startups with pro bono help but later, upon further discussion in additional interviews, and upon further analysis, was expanded.
33. For more details on the primary research methodology, see Appendix 2, available at https://www.elr.info/sites/default/files/files-pdf/Lazarus_App2_online.pdf.
34. Sustainable Food CEO Interview, *supra* note 23.
35. Sustainable Agric. CEO 2 Interview, *supra* note 19.
36. Sustainable Food CEO Interview, *supra* note 23; Sustainable Transportation CEO Interview, *supra* note 23; Sustainable Materials CEO 1 Interview, *supra* note 19.
37. *See* Sherry Frey et al., *Consumers Care About Sustainability—And Back It Up With Their Wallets*, McKinsey & Co. & NielsenIQ (Feb. 6, 2023), https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/consumers-care-about-sustainability-and-back-it-up-with-their-wallets.
38. *See* McKinsey & Co., The ESG Premium: New Perspectives on Value and Performance (2020), https://www.mckinsey.com/~/media/mckinsey/business%20functions/sustainability/our%20insights/the%20esg%20premium%20new%20perspectives%20on%20value%20and%20performance/the-esg-premium-new-perspectives-on-value-and-performance.pdf; cf. Morgan Stanley Institute for Sustainable Investing, Sustainable Value: How Emerging Public Companies Can Deliver on ESG Expectations 2 (2020), https://www.morganstanley.com/content/dam/msdotcom/en/assets/pdfs/3327223_Sustainable-Value-Delivering-ESG-Expectations_FINAL_REVISED.pdf (showing record levels of sustainable investment in 2020 of more than $16 trillion).
39. *See* Robin M. Rotman et al., *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 Admin. L. Rev. 417, 420 (2020); *see also* Alexa Riccolo, *The Lack of Regulation in Preventing Greenwashing of Cosmetics in the U.S.*, 47 J. Legis. 120, 121 (2021).
40. *See* Adele Peters, *68% of U.S. Execs Admit Their Companies Are Guilty of Greenwashing*, Fast Co. (Apr. 13, 2022), https://www.fastcompany.

Table 1. Key Themes of Critical Legal/Policy Challenges Identified for Green Startups*

Legal/Policy Challenge Theme	Green Startup CEOs & Law Firm Partners (31)
Greenwashing**	62% (19)
Regulatory compliance	58% (18)
Financing needs/restrictions***	48% (15)
Incorp. for profit/impact****	19% (6)
Other	19% (6)

* *See* Online Interview with Anonymous, CEO, Sustainable Food Startup (Nov. 12, 2021); Online Interview with Anonymous, CEO, Sustainable Transportation Startup (Nov. 15, 2021); Online Interview with Anonymous, CEO, Sustainable Materials Startup (Nov. 18, 2021); Online Interview with Anonymous, CEO, Clean Energy Storage Startup (Nov. 18, 2021); Online Interview with Anonymous, CEO, Clean Energy Storage Startup (Nov. 22, 2021); Online Interview with Anonymous, CEO, Sustainable Agric. Startup (Nov. 23, 2021); Online Interview with Anonymous, CEO, Sustainable Materials Startup (Nov. 23, 2021); Online Interview with Anonymous, CEO, Sustainable Agric. Startup (Dec. 6, 2021); Online Interview with Anonymous, CEO, Sustainable Materials Startup (Dec. 7, 2021); Online Interview with Anonymous, Pro Bono Staff and Senior Partner, Law Firm (Nov. 24, 2021); Online Interview with Anonymous, Senior Partner, Law Firm (Dec. 6, 2021); Online Interview with Anonymous, Senior Partner, Law Firm (Dec. 7, 2021); Online Survey with Anonymous, Senior Partners and Pro Bono Counsel, Law Firms (Nov. 2021-Mar. 2022); Survey with Anonymous, CEOs, Green Startups (Nov. 2021-Mar. 2022).

** "Greenwashing" can be defined as "[f]alse or misleading environmental claims." Robin M. Rotman et al., *Greenwashing No More: The Case for Stronger Regulation of Environmental Marketing*, 72 ADMIN. L. REV. 417, 419 (2020).

*** Legal and policy challenges related to the theme of "Financing needs/restrictions" were perhaps underdeveloped, and primary research participant discussion of this theme ultimately appeared to offer less insight than discussion of the other three substantive challenges; most of those who raised this theme offered little to no detail. *See* Online Survey with Anonymous, CEOs, Green Startups (Nov. 2021-Mar. 2022) and Online Survey with Anonymous, Senior Partners and Pro Bono Counsel, Law Firms (Nov. 2021-Mar. 2022). The few who did offer more detail provided little of substance; while three green startup CEOs referenced the legal challenges of obtaining financing from foreign investors, one of those green startup CEOs and one law firm partner characterized such a challenge as not distinct to green startups. Online Interview with Anonymous, CEO, Sustainable Transportation Startup (Nov. 15, 2021) and Online Interview with Anonymous, Senior Partner, Law Firm (Dec. 6, 2021); *see* Online Survey with Anonymous, CEOs, Green Startups (Nov. 2021-Mar. 2022).

Of the three other green startup CEOs who offered more detail, one simply commented on the legal challenge of negotiating with investors more generally, another on different legal entity forms as each relates to ease of obtaining funding, and a third on the general importance of obtaining funding. See Online Survey with Anonymous, CEOs, Green Startups (Nov. 2021-Mar. 2022). As such, this theme is not otherwise discussed in this Article. Future research efforts could perhaps better identify and explore if and how green startups face legal and policy challenges related to financing needs and restrictions, including if and how the longer timelines for commercialization that many green startups face, as detailed earlier in this Article, manifest as legal and policy challenges. One way in which this Article does discuss how longer timelines for commercialization manifest as a legal and policy challenge is how it affects a green startup's ability to afford legal help, as further discussed in Part II.B.

**** Unlike the other themes, all the lawyers and green startup CEOs who raised this theme did so without any prompting. *See* Online Interview with Anonymous, CEO, Sustainable Agric. Startup (Dec. 6, 2021); Online Interview with Anonymous, CEO, Sustainable Materials Startup (Dec. 7, 2021); Survey with Anonymous, CEOs, Green Startups (Nov. 2021-Mar. 2022); Online Interview with Anonymous, Senior Partner, Law Firm (Dec. 7, 2021). Moreover, the discussion of this theme was especially rich. *See id.* By contrast, the other substantive legal challenge themes were identified earlier on and raised with the surveyees and interviewees in the first round of primary research to see if these themes resonated with them, as discussed in greater detail in Appendix 2, available at https://www.elr.info/sites/default/files/files-pdf/Lazarus_App2_online.pdf.

der green startups described legal and policy challenges related to greenwashing and difficulty verifying sustainable impact as among the most critical they face. Many of the green startup CEOs from a variety of industries decried the absence of any adequate sustainability standards or certifications in their industries.

The CEO of one clean energy storage startup stated that "there are no standards,"[41] elaborating that there "are a bunch of concepts that get used by different organizations . . . [b]ut there's nothing on the federal level or international level"[42]; while the CEO of a sustainable agriculture startup similarly complained that none of the sustainable impact claims in their industry are regulated, and "[n]o one defines the methodology by which you make those claims or measure those outcomes."[43] Two CEOs of sustainable materials startups in different industries also both described examples of competitors engaging in greenwashing by advertising their sustainability using unregulated descriptors that come without formal definitions or criteria.[44]

Even in industries where sustainable standards and certifications exist, they can be easy for greenwashing competitors to game. The CEO of a sustainable transportation startup in a space with an array of different sustainable standards maintained by both state governments and private institutions described how companies can "selectively apply criteria to assess themselves [and] make

com/90740501/68-of-u-s-execs-admit-their-companies-are-guilty-of-greenwashing.
41. Energy Storage CEO 2 Interview, *supra* note 23.
42. *Id*.
43. Sustainable Agric. CEO 2 Interview, *supra* note 19.
44. *See* Sustainable Materials CEO 1 Interview, *supra* note 19; Sustainable Materials CEO 2 Interview, *supra* note 23.

them look good,"[45] adding that claims about greenhouse gas impact are "very difficult to validate."[46] The CEO of a sustainable agriculture startup commented how, in industries where different sustainability standards are maintained by different private institutes, it can be especially difficult for consumers to differentiate among which institutes are more or less legitimate.[47]

Indeed, in the absence of adequate regulation of environmental claims, studies of the effectiveness of sustainability standard-setting and certification by governmental and nongovernmental institutions, including of voluntary adherence to these standards by companies, assess them as a positive but severely limited alternative[48] that "may amount to merely 'greenwashing'"[49] and that, "by holding open competition from different standards, might produce a race to the bottom."[50] Describing the undeveloped state of sustainable standards, certifications, and labels in the United States more generally, three green startup CEOs from different industries described the situation as like the "Wild West,"[51] while the CEO of a sustainable agriculture startup proclaimed simply that "[i]t's chaos."[52] In short, as the CEO of one sustainable food startup noted, "there is a lot of crap out there."[53]

2. Outdated Regulatory Frameworks and Incumbent Influence

> The principal legal challenges are regulatory. The law historically lags the development of technology, and vested interests are entrenched.
>
> —Senior law firm partner[54]

The above law firm partner's response captures the most common aspect of the regulatory challenge cited by green startup CEOs from across different industry sectors—there were no applicable regulatory standards, categories, and/or frameworks to govern their new, sometimes first-in-kind sustainable technologies. LeSage similarly observed the inability of many regulatory tools to keep pace with private-sector sustainable innovation more than a decade ago,[55] suggesting the long-standing nature of this formidable challenge for green startups. LeSage also notes how large businesses are often better able to influence policymakers than small businesses.[56]

Albert Lin describes how incumbents in the energy space have put this influence to work in resisting the advance of clean energy technology by advocating "for regulation of potential rivals . . . [and] lobby[ing] against government support [for clean energy],"[57] bolstering the law firm partner's position that non-green incumbent competitors of green startups may wield their influence to further hold back regulatory frameworks from accounting for new sustainable technology. Although the inability of slow-moving regulation to account for new technology extends beyond sustainable innovation to other industries,[58] the issue may be especially pronounced for major industries important to the sustainable transition such as energy because, as another senior law firm partner observed, energy is an especially highly regulated space.[59]

In facing this challenge, some green startup CEOs tried their best to make do with existing—albeit not fully applicable—regulatory standards. The CEO of one green startup with patented new sustainable food products, for instance, described how they were forced to operate out of the facilities of an incumbent food company for no reason other than that the current regulatory framework does not recognize the existence of their products.[60] The CEO also described how, as part of operating under the existing regulatory framework of the incumbent food industry in their sector, they are forced to comply with safety standards, reporting obligations, and other regulatory requirements that are completely irrelevant to their new, sustainable food products.[61] Even while they are forced to comply with the same requirements, the CEO decried that they nonetheless often receive fewer resources and attention than incumbent, non-green food companies operating under the same regulatory framework.[62] A senior law firm partner offered a similar example, describing how outdated regulation and vested interests have held back the expansion of subsidies to certain new, renewable energy technologies.[63]

Rather than passively accept whichever inapplicable regulatory standard was thrust upon their new sustainable technology, other green startup CEOs took a more active approach; green startup CEOs developed entirely new frameworks and standards and then advocated for regulators to adopt and apply those standards to their new sustainable technology. The CEO of one renewable energy storage startup, for instance, described an elaborate process for fostering the development of a new regulatory standard

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45. Sustainable Transportation CEO Interview, *supra* note 23.
46. *Id.*
47. *See* Sustainable Agric. CEO 2 Interview, *supra* note 19.
48. Cary Coglianese, *Environmental Soft Law as a Governance Strategy*, 61 Jurimetrics J. 19, 19 (2020) (noting that soft law, which "relies on nongovernmental institutions that establish and implement voluntary standards," can "be quite limited in what it actually achieves").
49. *Id.* at 49.
50. *Id.* at 50.
51. Sustainable Food CEO Interview, *supra* note 23; Sustainable Transportation CEO Interview, *supra* note 23; Sustainable Materials CEO 1 Interview, *supra* note 19.
52. Sustainable Agric. CEO 2 Interview, *supra* note 19.
53. Sustainable Food CEO Interview, *supra* note 23.
54. Lawyer Survey, *supra* note 18.
55. LeSage, *supra* note 3, at 681.
56. *Id.* at 682.
57. Lin, *supra* note 14, at 1821.
58. *See, e.g.*, Gary Marchant et al., *Governing Emerging Technologies Through Soft Law: Lessons for Artificial Intelligence*, 61 Jurimetrics J. 1, 1 (2020) (noting how "the rapid pace of development [of artificial intelligence (AI) technology] make[s] traditional governance structures hard to impose").
59. Lawyer 2 Interview, *supra* note 19; *cf.* Macey & Salovaara, *supra* note 16, at 1198-99 (describing how heavy regulation of utility electricity prices to consumers depresses innovation in the U.S. electricity market, driving down the rate at which investor-owned utilities invest their revenue into research and development especially far below those of companies in other industries such as pharmaceuticals and computer manufacturing, and even well below those of companies in less technology-dependent industries).
60. *See* Sustainable Food CEO Interview, *supra* note 23.
61. *See id.*
62. *Id.*
63. Lawyer Survey, *supra* note 18.

for their first-in-kind sustainable technology.[64] The CEO described how, after developing a new safety standard for their own technology, they would then need to get it adopted by multiple relevant global standards institutes and bodies in a sequential order.[65]

If and after the safety standard is adopted by the relevant global institutes and bodies, the CEO described how they would then need to approach the relevant U.S. regulators to convince them to adopt the safety standard in their own regulations for use in evaluating the green startup's energy storage technology.[66] The CEO emphasized how an important part of persuading regulators is collaborating with large industry-incumbent customers that can convince the regulators of the value of the green startup's new safety standard.[67] To the extent that vested or incumbent interests of non-green companies can hold back the advance of regulation to account for new sustainable technology, it thus appears that one effective approach can be to ally with other influential industry incumbents who stand to benefit from such new sustainable technology.

Other green startup CEOs took an active but less bold approach; rather than advocate for entirely new regulatory standards, these green startup CEOs tried to convince regulators to apply whichever inapplicable existing regulatory standard that the CEO believed would be most beneficial for their technology. Such was the case for a green startup CEO who noted how they benefited immensely from the pro bono legal help and advocacy efforts of one law firm that worked with the CEO to educate government officials about the startup's new technology and to persuade them on how best to regulate it, including through the authorship of thought leadership pieces in news media.[68] The CEO added that, although they ultimately hope to create a new regulatory standard that would be applicable to their technology, if their business model relied too heavily on the creation of such a new standard, then their venture would certainly fail, as their investors would likely lose patience over the slow pace of policymaking.[69]

On the opposite end of the spectrum were green startup CEOs who balked at the prospect of navigating existing regulatory frameworks, let alone influencing them. The CEO of one clean energy storage startup, for instance, described the difficulty of navigating state and city bureaucracies. This CEO noted how, even though many individual government officials support integration of the green startup's technology with existing infrastructure, none of them were sure what government process, funding mechanism, or even members of government could allow this to occur, or else were too risk averse to push for the adoption of new sustainable technology in existing bureaucratic systems.[70] The CEO decried that there simply appears to be no framework for many local U.S. governments to adopt and integrate new technology into local infrastructure.[71] They described this as the most critical challenge facing their startup and, similar to the aforementioned green startup CEO that worked on thought leadership pieces, noted how long policy timelines can cause investors to lose their patience and doom a sustainable venture.[72]

3. Incorporating as a Social Enterprise

> The rate at which we're seeing PBC [public benefit corporation] interest from our founders [of green startups] is unprecedented and accelerating.
>
> —Senior law firm partner[73]
>
> Legal expertise with B Corps seemed scarce.
>
> —Green startup CEO[74]
>
> [T]he amount of wrong information [about social enterprises] out there is considerable.
>
> —Senior law firm partner[75]
>
> I love the idea of a B Corp and would love to consider it. My assumption is that investors would hate it, so without a lot of help, I wouldn't consider it seriously . . . .
>
> —Green startup CEO[76]

It should perhaps come as no surprise that green startups are especially drawn to pursue social enterprise[77] corporate forms to better allow them to pursue a dual purpose of not only profit, but also positive environmental and even social impact. Notably, in the focus group sessions, all four of the senior law firm partners present agreed that there was strong and growing interest from green startups in adopting some of these forms.[78] At the same time, in the focus group of green startup CEOs, all but one of the five CEOs that raised the term "B Corp"—not a form of legal entity but instead a certification[79]—confused that term as referring to a social enterprise corporate form, with the one CEO noting how many green startup CEOs seem to make this mistake.[80]

Given the strong interest from green startups in becoming social enterprises, the many legal and policy challenges that accompany adoption of these business entity forms are thus especially relevant in the green startup context.

64. *See* Energy Storage CEO 1 Interview, *supra* note 23.
65. *See id.*
66. *See id.*
67. *See id.*
68. *See* Online Interview with Anonymous, CEO, Startup (previously cited but industry affiliation removed to protect anonymity) (Nov. 2021-Dec. 2021).
69. *See id.*
70. *See* Energy Storage CEO 2 Interview, *supra* note 23.
71. *See id.*
72. *See id.*
73. Lawyer Focus Group, *supra* note 28.
74. CEO Focus Group, *supra* note 27.
75. Lawyer Focus Group, *supra* note 28.
76. CEO Focus Group, *supra* note 27.
77. This Article adopts the Association of Pro Bono Counsel's (APBCo's) definition of "social enterprise": "any for-profit business venture that seeks to produce both financial as well as positive social and/or environmental returns." APBCo, APBCo Statement on the Eligibility of Non-Profit Entities, For-Profit Small Business Entities, Social Enterprise Entities, and Impact Finance Transactions for Pro Bono Legal Services 20 (2015) [hereinafter APBCo Statement].
78. Lawyer Focus Group, *supra* note 28.
79. *See* B Lab, *About B Corp Certification: Measuring a Company's Entire Social and Environmental Impact*, https://www.bcorporation.net/en-us/certification/ (last visited Nov. 9, 2023).
80. *See* CEO Focus Group, *supra* note 27.

One senior law firm partner even went so far as to the say that these are the only set of critical legal and policy challenges that are more relevant to green than non-green startups.[81] Acknowledging that other non-green but social impact-minded startups may also be especially drawn to social enterprise corporate forms, this section focuses on the aspects of these challenges identified in the primary research findings that are most relevant to green startups, while also providing additional context by discussing the broader literature on social enterprises.

Green startups may have a variety of reasons for choosing social enterprises over traditional corporate forms. One driving reason is to allow for greater flexibility to prioritize sustainable impact over profits. Although (contrary to popular belief)[82] the fiduciary duties of traditional corporate forms to pursue profits for shareholders do not equate to a duty to maximize shareholder returns above all else[83]—and may leave significant flexibility for companies to pursue sustainable impact instead of just profit without facing legal liability relating to these duties[84]—social enterprises may offer significant protection against the risk of liability for pursuing sustainable impact over profits.[85] A sustainable agriculture startup CEO and green materials startup CEO both described such a motivation as their driving reason for making their respective startups social enterprises.[86] Green startups can also employ social enterprise corporate forms to go one step further, creating potential commitment and/or enforcement mechanisms for their startup's pursuit of a sustainable mission.[87]

Another motivation green startups may have to adopt social enterprise corporate forms is to help them authenticate their sustainable impact.[88] Greenwashing, for instance, may be more difficult for businesses that adopt a benefit corporate form, as benefit corporations "must use third-party auditors to review their actions [as regards their social/environmental impact] and publicly disclose the audit findings."[89] By better authenticating their sustainable impact, green startups may be able to better attract not only the sustainably minded customers and investors mentioned above in the section on challenges related to greenwashing, but also employee talent. Indeed, one financial services green startup CEO described how normalizing social enterprises "empower[s] recruiting [and] builds relationship[s] with customers."[90] Assessing to what extent different social enterprise corporate forms may help achieve these goals, as well as what risks they may entail, however, is where things get complicated.

There are a wide variety of potential ways for green startups to become social enterprises. As business entity forms are ultimately creatures of contract, one potential way is for a green startup to retain their status as a C corp or limited liability company (LLC),[91] but agree to additional or revised contractual provisions with shareholders and directors to better accommodate their dual profit and sustainable impact focus.[92] Another way would be to adopt any of the more standardized social enterprise corporate forms encoded widely in state corporate statutory law throughout the United States.[93] Instead of an LLC, for instance, a green startup could consider becoming a low-profit limited liability company (L3C) (legal in 10 states),[94] which is "legally obligated to advance its mission over profitability"[95] and may repel investors who require returns on capital.[96] Instead of a C corp, green startups could also consider becoming a benefit corporation (legal in more than 40 states),[97] or a Delaware[98] public benefit corporation (PBC), among other social enterprise corporate forms.[99]

These different forms may offer varying degrees of flexibility for green startups to pursue sustainable impact over profit, and come with varying degrees of sustainability auditing and reporting requirements, along with an array

81. Lawyer 3 Interview, *supra* note 19.
82. *See* Jessica Chu, *Filling a Nonexistent Gap: Benefit Corporations and the Myth of Shareholder Wealth Maximization*, 22 S. Cal. Interdisc. L.J. 155, 163-68 (2012).
83. *See id.* at 168-81; Orrick et al., Balancing Purpose and Profit: Legal Mechanisms to Lock in Social Mission for "Profit With Purpose" Businesses Across the G8, at 143 (2014).
84. *See* Orrick et al., *supra* note 83; *but see* APBCo Statement, *supra* note 77, app. A3.
85. Orrick et al., *supra* note 83, at 137; Chu, *supra* note 82, at 181; Elizabeth Schmidt, *New Legal Structures for Social Enterprises: Designed for One Role but Playing Another*, 43 Vt. L. Rev. 675, 688 n.91, 713 (2019) (citing William Clark Jr. et al., The Need and Rationale for the Benefit Corporation: Why It Is the Legal Form That Best Addresses the Needs of Social Entrepreneurs, Investors, and, Ultimately, the Public 6 (2013) ("Whatever the letter of the law, . . . the risk of litigation if one fails to maximize shareholder value, ha[s] a chilling effect on corporate behavior as it relates to pursuit of a social mission.")); *but see* Schmidt, *supra*, at 713-14.
86. *See* Sustainable Agric. CEO 2 Interview, *supra* note 19; Sustainable Materials CEO 3 Interview, *supra* note 19.
87. *See* Orrick et al., *supra* note 83, at 144; Robert A. Katz & Antony Page, *Sustainable Business*, 62 Emory L.J. 851, 865 (2013) (describing how some states have benefit directors that can monitor a benefit corporation's pursuit of its nonpecuniary purpose, as well as allow for enforcement proceedings to compel benefit corporations to pursue these purposes); *see also* Leo E. Strine Jr., *Making It Easier for Directors to "Do the Right Thing"?*, 4 Harv. Bus. L. Rev. 235 (2014) (an article from the former Chief Justice of the Delaware Supreme Court arguing that the benefit corporation may make it easier for these businesses to commit to positive impact).
88. *See* Roxanne Thorelli, *Providing Clarity for Standard of Conduct for Directors Within Benefit Corporations: Requiring Priority of a Specific Public Benefit*, 101 Minn. L. Rev. 1749, 1751 (2017); Joseph W. Yockey, *Does Social Enterprise Law Matter?*, 66 Ala. L. Rev. 767, 802 (2015); Orrick et al., *supra* note 83, at 137.
89. Morrison Foerster, *Social Enterprise—The Use of Corporate Forms to Promote Impact*, https://www.mofo.com/impact-investing/social-enterprise (last visited Nov. 9, 2023).
90. CEO Focus Group, *supra* note 27.
91. LLCs and corporations (C corps) are some of the most common, traditional for-profit business corporate entity forms. *See* Orrick et al., *supra* note 83, at 136.
92. *See id.*
93. The social enterprise entity form the "benefit corporation," for instance, has been authorized by state legislation in more than 80% of states. Matt Kuhlik & Wolfgang Jorde, New York University School of Law, The State of Social Enterprise and the Law 2021-2022, at 7.
94. Morrison Foerster, *supra* note 89.
95. *Id.*
96. *See id.*
97. *See* Kuhlik & Jorde, *supra* note 93, at 7.
98. Delaware is "a leading domicile for U.S. and international corporations. . . . More than 66% of the Fortune 500 have chosen Delaware as their legal home." Delaware Division of Corporations, *About the Division of Corporations*, http://corp.delaware.gov/aboutagency.shtml (last visited Nov. 9, 2023).
99. Morrison Foerster, *supra* note 89.

of other different pros and cons.[100] There are even significant legal differences in the models of the benefit corporation across the different states in which it is authorized.[101] Finally, easily confused with a benefit corporation, there is also the Certified B Corporation (B Corp), which is not a legal form offering protection from fiduciary duties to pursue profit, but rather a certification, from the nonprofit B Lab, that could help a green startup authenticate its sustainable impact.[102] A full assessment of the different social enterprise corporate forms is beyond the scope of this Article. Rather, the rest of this section describes the high-level legal and policy challenges green startups face in pursuing the one best suited to their needs.

Given the wide variety of social enterprise and other corporate forms available, it is no wonder that green startups report struggling with deciding which entity form to adopt. The CEO of one green financial technology startup, for instance, described their struggle over deciding whether to incorporate as a for-profit, nonprofit, or some hybrid entity.[103] In particular, the CEO considered how, because of their "unconventional solution, [they] . . . could raise money faster being a non-profit, but [that their] purpose demands a for-profit . . . to maintain independence."[104] Another green startup CEO described how their previous green startup was a B Corp, which they found "didn't offer much," such that they decided to make their current green startup a PBC[105]; notably, this CEO either confused a B Corp with a benefit corporation or a B Corp with a corporate entity form.

Green startup CEOs may be wise to fret over the decision regarding which social enterprise corporate form to adopt. Benefit corporations in states that do not require these companies to make their benefit reports[106] publicly available may risk perpetuating rather than addressing greenwashing.[107] More generally, the quality and implications of social enterprises vary significantly not only across different corporate forms, but even for the same corporate form across different states. One senior law firm partner characterized PBCs and benefit corporations authorized in some states as "investable," and benefit corporations authorized in other states as "not investable" and in some states as even "a travesty."[108]

Potential investor hesitancy toward social enterprise corporate forms as a whole even held back some green startup CEOs from adopting any such form. One financial services green startup CEO, for instance, refrained from adopting any social enterprise corporate form after receiving "a lot of feedback that investors would . . . devalue us and find us less investable,"[109] while two other green startup CEOs refrained after expressing their concern that investors would be hesitant to invest in these forms.[110] This experience was not uniform, as another green startup CEO reported that they ultimately decided to adopt the benefit corporation form after receiving advice from venture capitalists (VCs) that it would not pose a significant barrier.[111]

Indeed, one senior law firm partner described how impact-focused climate tech investors that just a few years ago were hesitant to invest in PBCs have become much more comfortable investing in them.[112] Another senior law firm partner similarly emphasized that even some of the largest profit-focused (i.e., not impact) investors have become comfortable investing in PBCs.[113] The beginnings of wider acceptance of PBCs is apparent as at least 10 are now listed on U.S. public equity markets.[114] Even so, much of the market is still learning, as exemplified by one carbon utilization and storage startup CEO who described having to educate their investors about PBCs before the startup could adopt the corporate form.[115]

Whether for educating investors or selecting the most suitable social enterprise corporate form, obtaining qualified legal help is paramount for green startups looking to become a social enterprise. The challenge is that qualified legal help for social enterprises can be hard to come by. Traditional corporate law expertise alone is insufficient for an attorney to adequately address the new legal complexities that social enterprises present.[116]

In the focus group sessions, law firm partners discussed how even the top law firms have often gotten it wrong when it comes to social enterprise law, such that some of the few leading lawyers most knowledgeable about the space have felt compelled to offer their support ad hoc, essentially serving as informal back offices for these and other law firms and sharing their relevant knowledge free of charge.[117] The CEO of an energy-efficiency green startup noted from their experience that much of the legal community is still "coming up the learning curve" on the social enterprise corporate form of the social purpose corpora-

100. *Id.*
101. *Id.*
102. Sydney Forrest et al., New York University School of Law, The State of Social Enterprise and the Law 2020-2021, at 6. "[H]owever, most B Labs license agreements do require that the boards and management convert to 'benefit corporation' status to retain the right to use the [B Corp] mark." Morrison Foerster, *supra* note 89.
103. CEO Survey, *supra* note 19. The full quote from the CEO (when asked what are some of the distinct legal challenges facing sustainability focused startups) was: "At our early stage, it is defining the type of company. For-Profit, non-profit, a mix?" *Id.* This Article paraphrases the CEO's use of the word "mix" with the term "hybrid entity."
104. *Id.*
105. Sustainable Agric. CEO 2 Interview, *supra* note 19.
106. Benefit corporations are required by state statute, either annually or biennially, to create a benefit report for their shareholders that describes both how the benefit corporation pursued, and how well it performed against, its social/environmental impact and financial goals. Drake Forester, *Benefit Report Requirements: How to Meet Report Requirements for Your Benefit Corporation*, Nw. Registered Agent, https://www.northwestregisteredagent.com/corporation/b-corp/report-requirements (last visited Nov. 9, 2023).
107. Alina Ball, *Social Enterprise Lawyering*, 88 UMKC L. Rev. 803, 809 (2020).
108. Lawyer Focus Group, *supra* note 28.
109. CEO Focus Group, *supra* note 27.
110. *See id.*
111. *Id.*
112. *See* Lawyer Focus Group, *supra* note 28.
113. *See id.*
114. Christopher Marquis, *Public Benefit Corporations Flourish in the Public Markets*, Forbes (June 14, 2021), https://www.forbes.com/sites/christophermarquis/2021/06/14/public-benefit-corporations-flourish-in-the-public-markets/?sh=559c79d233d4.
115. *See* CEO Focus Group, *supra* note 27.
116. Ball, *supra* note 107, at 813.
117. *See* Lawyer Focus Group, *supra* note 28.

tion.[118] Echoing this point, another green startup CEO commented that they were held back from incorporating as a social enterprise because of their inability to find attorneys with expertise in the area.[119]

The novelty of social enterprise law more broadly continues to present challenges to not just traditional corporate lawyers, but also leaders in the space, and unresolved legal issues abound. One senior law firm partner described how, given the lack of precedent case law to offer guidance, such leaders spend days debating (outside the courtroom and amongst themselves) novel questions regarding fiduciary duty and to what extent PBCs need to include their benefit report in their public securities filings.[120] Such novelty means not only additional risk, but also high levels of legal expenses.

The CEO of a green materials startup, for instance, described how legal work for establishing and maintaining a social enterprise can be quite expensive because "nothing is standard" such that there is no "low-cost road map."[121] One law firm partner elaborated on some of the other possible legal challenges that social enterprises may face that traditional for-profit enterprises may not, including negotiations with investors regarding corporate provisions to protect a green startup's pursuit of a sustainable mission and/or commit their startup to pursue the same; impact reporting metrics; and environment, social, and governance (ESG) diligence paths.[122] In short, becoming a social enterprise may not be for the faint of heart.

B. Legal Help Affordability/Pro Bono Challenges

Whether or not they become social enterprises, many green startups are driven by not just profit, but also environmental and social impact. In combination with longer pathways to commercialization that may make it harder for them to afford legal services, their impact motive suggests that many green startups may not only be in greater need, but also potentially more deserving of greater support from law firms. This section focuses on the challenges related to law firms choosing and implementing alternative and discounted legal fees or pro bono arrangements for green startups. These challenges may be more relevant for green startups compared to startups generally because of the longer pathways to commercialization that many green startups may face.

1. Background: Law Firm Billing and Pro Bono Practices for Startups

Most law firms have adopted as the standard billing practice charging clients an hourly rate for time worked on a legal matter.[123] To better accommodate the many early-stage startups that, prior to financing, may be unable to afford the legal fees from an hourly rate,[124] a number of law firms offer alternative fee arrangements, including flat fees,[125] discounts,[126] caps on the total amount of fees owed,[127] equity investment into the startups in lieu of fees,[128] and fee deferral,[129] where early-stage startup clients are allowed to defer payment until a specified later date or until if and when they receive financing.[130] Some law firms may even write off the fees of failed startups, or the founders of those failed startups, that are unable to obtain financing from any obligation to pay.[131]

Another path for early-stage startups unable to afford standard legal fee arrangements is simply to obtain legal help pro bono. To help manage their pro bono practices and policies, many large law firms have pro bono counsel and staff,[132] as well as internal pro bono committees.[133] Nonprofit legal aid groups also play an influential role in screening[134] and referring[135] potential pro bono clients to law firms, as well as helping advise and facilitate law firm decisionmaking regarding pro bono eligibility policies and guidelines.[136]

In particular, the Pro Bono Institute (PBI)—with members from more than 90 major corporate law firms[137]—and the Association of Pro Bono Counsel (APBCo)—with attorney and practice group members "who run pro bono practices in over 130 of the world's largest law firms"[138]—together play an especially influential role.[139] As such, analyzing both nonprofit legal aid groups' pro bono eligibility

118. Lawyer Survey, *supra* note 18.
119. *See* CEO Focus Group, *supra* note 27; Sustainable Agric. CEO 2 Interview, *supra* note 19.
120. *See* Lawyer Focus Group, *supra* note 28.
121. Sustainable Materials CEO 3 Interview, *supra* note 19.
122. Lawyer 3 Interview, *supra* note 19.
123. Sarah Boulden, *The Business of Startup Law: Alternative Fee Arrangements and Agency Costs in Entrepreneurial Law*, 11 J. Telecomm. & High Tech. L. 279, 281 (2013).
124. *Id.* at 294.
125. *Id.* at 280.
126. *Id.* at 288.
127. *Id.* at 289.
128. Kevin Miller, *Lawyers as Venture Capitalists: An Economic Analysis of Law Firms That Invest in Their Clients*, 13 Harv. J. L. & Tech. 435, 438-39 (2000).
129. Boulden, *supra* note 123, at 288.
130. *Id.* at 294.
131. *See id.* at 295.
132. Scott L. Cummings & Deborah L. Rhode, *Managing Pro Bono: Doing Well by Doing Better*, 78 Fordham L. Rev. 2357, 2373 (2010).
133. *See id.* at 2380-81.
134. *See id.* at 2398; Pro Bono and Lawyer 1 Interview, *supra* note 19 (Pro bono legal staff at one law firm described vetting potential pro bono clients as one of their biggest challenges, stating that they preferred to rely on external nonprofit legal aid groups to vet for them.).
135. Cummings & Rhode, *supra* note 132, at 2383; *see also* APBCo Statement, *supra* note 77, at 11 (noting that "[l]aw firms often heavily rely on referrals made by these organizations [(nonprofit legal aid groups)] . . . [and] such a referral can be a sufficient indication that a proposed client qualifies for pro bono legal services").
136. *See, e.g.*, Pro Bono Institute, *About Us*, https://www.probonoinst.org/about-us/ (last visited Nov. 9, 2023); APBCo, *Home Page*, https://apbco.org/ (last visited Nov. 9, 2023).
137. *See* PBI, *Current Law Firm Members*, https://www.probonoinst.org/law-firm-pro-bono-project/current-law-firm-members (last visited Nov. 9, 2023).
138. APBCo, *supra* note 136.
139. *See* Pro Bono and Lawyer 1 Interview, *supra* note 19; Lawyer Survey, *supra* note 18.

guidelines offers important insight for how law firms assess the pro bono eligibility of green startups.[140]

In assessing the pro bono eligibility of for-profit businesses, both PBI and APBCo consider the income levels of the individuals running the business,[141] the ability of the business to afford legal help,[142] and to what extent the business promotes a positive social impact.[143] PBI advises that, although they should rarely be eligible for pro bono,[144] a for-profit entity can be eligible for pro bono legal help if either the individuals running the entity themselves are eligible or the entity's mission and revenue are committed to benefitting disadvantaged peoples, the entity is unable to afford legal or other professional services, and the pro bono relationship only lasts until the entity "becomes successful and can pay for counsel without sacrificing its mission."[145] APBCo offers more detailed, step-by-step guidance based on whether it qualifies the entity as a "startup small business," which APBCo defines as an early-stage business with no records of revenue or profits,[146] an "ongoing small business," which APBCo defines as a small business with at least one year of operational record or other reliable indication of financial operational performance,[147] or a "social enterprise."[148]

In particular, APBCo advises that when an entity's principals have an individual income of less than 300%[149] of the Federal Poverty Guidelines (FPG), then startup small businesses and social enterprises should be automatically eligible, while for ongoing small businesses, entity income should also be assessed. If greater than 300% but less than 500% of FPG, then startup small businesses should be eligible if they have a qualifying positive impact on their local community,[150] and ongoing small businesses should be eligible if they have a qualifying positive impact on their local community and the entity's income level makes it unable to afford legal help.[151] And if greater than 500% of FPG, then startup and ongoing small businesses should be deemed ineligible for pro bono,[152] and social enterprises should still be deemed eligible so long as they cannot afford legal help, the legal matter is both related to its mission and time-sensitive in nature, and the social enterprise's work either benefits poor people or involves a public right,[153] which includes public rights in the environment.[154] Such guidance offers important context for how law firms consider when green startups may qualify for pro bono legal help.

2. Pro Bono Eligibility Versus Deferred Fees

One of the most significant challenges related to providing legal help to green startups is determining if and when they should qualify for pro bono versus other discounted and deferred fee arrangements. Although influential among law firms, PBI's and APBCo's guidance appears not to have settled the issue—senior staff at a large nonprofit legal aid group described a lot of "heated debate" among law firms about offering pro bono to any for-profit entity, let alone social enterprises.[155] Yet, some law firm partners attest that they are willing to offer much more favorable discounts and deferrals to early-stage green startups than many peer law firms. In limited circumstances, these law firm partners are also willing to offer pro bono legal help. Some other law firm pro bono staff and counsel, meanwhile, appear more willing to offer pro bono legal help to green startups and other social enterprises in a relatively wider array of circumstances.

In assessing if and under what circumstances green startups should qualify for pro bono legal help, it is worth asking to what extent favorable discounts and deferrals could almost entirely displace the need for pro bono legal help for green startups. Pre-revenue, early-stage green startups with long paths to commercial viability may find more traditional discounted and deferred legal fee arrangements as too much risk to bear. One law firm partner, for instance, offered that they were willing to defer legal fees for early-stage green startups for a period of up to about six months.[156] The CEO of a financial services green startup that qualified for pro bono legal help through a nonprofit legal aid group, however, described how if instead of pro bono the cost of such legal help had merely been deferred for six months, then their startup would cease to exist.[157] The risk of significant legal debt in six months' time and neither investor capital nor startup revenue to pay for it may scare away a number of founders from such a legal fee arrangement.

But what if the terms of deferral were more favorable to green startups? In the focus group sessions, four law firm partners shared how they were willing to offer green startups discounted and deferred fee arrangements that from their experience were much more generous than those

140. Notably, a pro bono staff person at one law firm described their use of APBCo's guidance as "not a checklist" but instead "a weighing of factors" from APBCo's guidance. Pro Bono and Lawyer 1 Interview, *supra* note 19.

141. *See* PBI, Law Firm Pro Bono Challenge: Commentary to Statement of Principles (2017) [hereinafter PBI Statement]; APBCo Statement, *supra* note 77, at 8.

142. *See* PBI Statement, *supra* note 141; APBCo Statement, *supra* note 77, at 8.

143. *See* PBI Statement, *supra* note 141; APBCo Statement, *supra* note 77, at 8, 20.

144. PBI Statement, *supra* note 141.

145. *Id.* at 6.

146. APBCo Statement, *supra* note 77, at 10.

147. *Id.*

148. *Id.* at 20.

149. APBCo also notes that law firms may want to account for regional differences in the cost of living. *See id.* at 10-11 n.10.

150. Community impact includes supporting businesses that are "minority-owned or women-owned" and that benefit low-income populations, among other factors. *See id.* at 13.

151. *Id.* at 19. APBCo recommends that entities with annual profits that do not exceed $75,000 and annual gross sales that do not exceed $250,000 be deemed unable to afford legal help, while also recommending that the entity's staff salaries/expenses, professional fees, and affordable access to third-party funds all be examined. *Id.* at 11-12.

152. *Id.* at 19.

153. *Id.* at 29.

154. *See id.* at 5.

155. Legal Aid Staff 2 Interview, *supra* note 26.

156. Lawyer Survey, *supra* note 18.

157. CEO Focus Group, *supra* note 27.

offered by many other law firms.[158] One law firm partner elaborated how, through caps on fees and favorable deferrals, as well as spending significant time supporting green startup clients beyond legal services such as by looking at iterations of their business plan and introducing them to investors, they are able to work with green startups that might not raise money for a couple of years.[159] The partner added that they were willing to engage green startups on a deferred fee, "walk-away basis,"[160] presumably where they "walk away" without requesting deferred legal fees from the founders if the startup ultimately fails.

Another of the law firm partners similarly described their flexibility to extend deferral even after a green startup has received funding if they feel the startup is still "in a pre-funded type of operation mode."[161] Two of the above law firm partners further clarified that they were willing to offer pro bono to green startups not looking to receive venture funding, with one partner even expressing willingness to offer a hybrid of some pro bono and some especially favorable discounts for legal work for charitable projects of venture-backed companies.[162] More widespread adoption of such offerings could lessen, even if not fully displace, the need for pro bono for green startups, including those looking to receive venture funding.

Other attorneys are willing to take their pro bono offerings one step further; a pro bono staff person and pro bono counsel at three other law firms emphasized their support for offering pro bono to green startups in line with APBCo's guidance,[163] which, notably, does not assess pro bono eligibility based on whether or not the green startup is eventually looking to receive venture funding.[164] One financial services green startup CEO relatedly described how, without having received pro bono legal help for their otherwise intractable regulatory challenge, they would have had to hold an entire financing round for just their legal fees from dealing with this one challenge. The CEO of a sustainable transportation startup even described how they chose to pay for legal help for contract reviews, but received pro bono for addressing intractable regulatory roadblocks that they otherwise "would not have been able to afford."[165] APBCo's guidance appears to allow attorneys the discretion to offer pro bono in both such circumstances, recommending that an entity's "past payment of legal fees . . . [can] . . . be considered [but] . . . should not automatically disqualify . . . pro bono representation,"[166] and that law firms consider that "[s]ome matters might not be undertaken but for the availability of pro bono assistance [and also] . . . might be crucial to the continued viability of the organization."[167]

Expressing similar reservations about deferred fees replacing pro bono, another green startup CEO rejected a deferred fee arrangement after they were cautioned against it,[168] while the CEO of an especially capital-intensive green materials startup lamented that deferred fee instead of pro bono arrangements may encourage green startups to cut corners on seeking legal advice.[169] Indeed, senior staff at one nonprofit legal aid group described how one of their biggest challenges is that many early-stage green startups come to them having relied on low-cost online legal services platforms (not run by law firms), such that the law firms they are ultimately assigned with for pro bono have to spend additional time fixing the mistakes of the legal work from these platforms.[170]

Even when green startups qualify for it, however, pro bono may not always be the best option; pro bono legal work may be of lower quality than discounted legal work due to the lack of motivation or resources for pro bono from law firms, as well as the limited scope and time-bound nature of pro bono legal work that may prevent a law firm from forming a strong relationship with a green startup client. One green startup CEO summarized their pro bono experience: "we were definitely taking a back seat to paid clients."[171] Relatedly, one law firm partner cautioned that, while paying thousands of dollars in legal fees for a patent application may seem expensive to an early-stage green startup, the millions of dollars in funding that strong intellectual property (IP) protection may allow a green startup to ultimately receive may make deferred fees preferable to obtaining weaker IP protection from pro bono.[172]

Indeed, perhaps exemplifying the law firm partner's point, the CEO of a green food startup that received pro bono legal help for IP and other matters described the experience as "great," but noted the challenge that the lawyers they worked with "don't necessarily have a ton of experience in food, particularly in IP."[173] Meanwhile, the CEO of a sustainable materials startup described how they accepted deferred fees for IP legal work and reserved pro bono for more straightforward legal work that did not require building a longer-term relationship, such as for nondisclosure agreements (NDAs) and material transfer agreements.[174]

Outside of selective use of pro bono, some CEOs also described negative overall experiences with pro bono; two green startup CEOs complained about the slow response time from their pro bono attorneys,[175] with one CEO emphasizing the "much better quality" work they received

158. *See* Lawyer Focus Group, *supra* note 28.
159. *Id.*
160. *See id.*
161. *Id.*
162. *See id.*
163. *See id.*
164. *See* APBCo Statement, *supra* note 77, at 12. Specifically, in assessing whether or not a for-profit, small business entity is able to afford legal help, APBCo recommends assessing the entity's ability "to access affordable capital [which significantly affects their ability to] . . . pay attorney fees without enduring severe financial hardship." Id. The possibility that with legal help a green startup may be able to obtain venture funding in the future does not qualify the green startup for APBCo's criteria of having affordable access to capital, in the present, for payment of attorney fees. *See id.*
165. *See* Sustainable Transportation CEO Interview, *supra* note 23.
166. APBCo Statement, *supra* note 77, at 4.
167. *See id.*
168. *See* CEO Focus Group, *supra* note 27.
169. *See id.*
170. *See* Legal Aid Staff 1 Interview, *supra* note 26.
171. CEO Focus Group, *supra* note 27.
172. *See* Lawyer Focus Group, *supra* note 28.
173. Sustainable Food CEO Interview, *supra* note 23.
174. CEO Focus Group, *supra* note 27.
175. *See id.*; Energy Storage CEO 1 Interview, *supra* note 23.

Table 2. Green Startup Study Participants' Pro Bono Experience+

Experience With Pro Bono	Number of Green Startups (19)	Sample Comments
Very positive	10	"amazing," "incredible"
Positive	4	"fantastic . . . [but] timeline can be challenging"
Negative	3	"not great"
Very negative	0	N.A.
Too early to tell	2	N.A.

+ *See* Online Interview with Anonymous, CEO, Sustainable Food Startup (Nov. 12, 2021); Online Interview with Anonymous, CEO, Sustainable Fuels Startup (Nov. 15, 2021); Online Interview with Anonymous, CEO, Sustainable Materials Startup (Nov. 18, 2021); Online Interview with Anonymous, CEO, Clean Energy Storage Startup (Nov. 18, 2021); Online Interview with Anonymous, CEO, Clean Energy Storage Startup (Nov. 22, 2021); Online Interview with Anonymous, CEO, Sustainable Agric. Startup (Nov. 23, 2021); Online Interview with Anonymous, CEO, Sustainable Materials Startup (Nov. 23, 2021); Survey with Anonymous, CEOs, Green Startups (Nov. 2021-Mar. 2022); Focus Group with Awnonymous, CEOs, Green Startups (May 5, 2022). The author of this Article made qualitative judgments, based on the comments from the green startup CEOs, to categorize these green startup CEOs' experience with pro bono.

when they began paying for legal work such that they "aren't even using the work from the pro bono firm."[176] Even so, when the alternative is even worse or no legal help, as the CEO of a carbon utilization startup put it, "the benefit of having a legal eye, even if it's not top quality, is that you are covering your ass," describing how their mentors and law firm advised them that legal loopholes in foundational legal documents are some of the biggest ways in which startups can fail.[177] Moreover, of the 19 green startups that both participated in this Article's primary research and received pro bono legal help, more than two-thirds described very positive or positive experiences with pro bono, as shown in Table 2. One sustainable materials startup CEO, for instance, lauded the benefits of having lawyers explain their contracts with suppliers,[178] while the CEO of a carbon utilization startup described how having "[a]ccess to top tier lawyers at such a foundational stage of a company lifecycle is incredible."[179]

In addition to their expressed, valid concerns regarding the quality of pro bono legal help for green startups, law firm partners may also have a business reason for not offering pro bono to green startups looking to receive venture funding. Senior staff at a large national nonprofit legal aid group described how, "in recent years, because some [law] firms are now onboarding a lot of clients in the social enterprise space . . . and are trying to make a paying practice out of it, . . . they're more reluctant to taking on these matters pro bono."[180] As one law firm partner more directly put it, "because we do so much work with green startups, we can't just do it pro bono."[181]

And yet, the law firm partner also mentioned a business exception, describing how, although they do not place it in their category of pro bono, they do offer green startups in certain incubators and that win certain business plan competitions a limited amount of free legal work before switching to a deferred fee basis.[182] The CEO of a sustainable payment platform startup similarly noted that they had received free legal help from a law firm partnered with an incubator.[183] More generally, law firms have been known to partner with incubators as a way to get access to promising startup clients.[184]

At least some senior law firm partners and pro bono counsel, meanwhile, appear willing even to directly combine pro bono and business opportunities, with two pro bono counsel and staff and four senior law firm partners from three separate law firms indicating a willingness to transition clients from a pro bono relationship to a billable relationship.[185] By contrast, one law firm partner expressly forbade such a transition, even while allowing for the above-mentioned business exception to transition green startup clients in certain accelerators from free to paid legal help.[186] Whether or not law firm partners and pro bono counsel call it pro bono, perhaps they can consider expanding free legal help to a wider array of promising

176. Energy Storage CEO 1 Interview, *supra* note 23.
177. CEO Focus Group, *supra* note 27.
178. *See* Sustainable Materials CEO 2 Interview, *supra* note 23.
179. CEO Survey, *supra* note 19.
180. Legal Aid Staff 2 Interview, *supra* note 26.
181. Lawyer 2 Interview, *supra* note 19.
182. *See id.*
183. *See* CEO Survey, *supra* note 19.
184. *Cf.* Kevin Davis, *Venturing Into Startup Territory: Law Firms Are Sponsoring Incubators, Cozying Up With Young Entrepreneurs*, 100 A.B.A. J. 55 (2014).
185. *See* Lawyer Survey, *supra* note 18; Pro Bono and Lawyer 1 Interview, *supra* note 19; Lawyer 3 Interview, *supra* note 19; Lawyer Focus Group, *supra* note 28.
186. *See* Lawyer 2 Interview, *supra* note 19.

green startups before switching to discounted and deferred fee arrangements.

3. Pro Bono Timing and Scope

One of the most significant challenges brought up by not only the CEOs of green startups receiving pro bono legal help, but also the senior staff of a nonprofit legal services organization that works with many green startups is timing and scope of legal services.[187] In particular, both this staff person and the CEOs describe how green startups are often unable to predict what their legal needs will be; by the time a green startup has applied, been assessed for eligibility, and then been assigned to a law firm to receive pro bono support for a defined scope of legal needs, their legal needs may very well have changed.[188] Indeed, one law school clinic that serves early-stage startups reported that the majority of legal issues they address for these startups are ones that the startups did not originally anticipate.[189] Limiting scope of pro bono legal help based on green startups' predictions of their legal needs may thus severely limit the effectiveness of such help.

III. Solutions and Recommendations

Solutions to the above critical legal and policy challenges for green startups were discussed in two focus group sessions, one with the CEOs of an array of promising green startups from different industries,[190] and one with senior law firm partners and pro bono counsel in the practice of advising sustainable startups and businesses.[191] Building on findings from the focus group sessions and related background literature, this part provides additional analysis and offers recommendations for solutions. Given the wide breadth of industries and topics covered, this section offers high-level recommendations organized into eight different areas.

A. *Expanding Pro Bono to Policy Advocacy and Regulatory Navigation*

Regulatory advising, policy advocacy, and lobbying support can often be critical for the survival of many early-stage green startups,[192] and yet green startups may often be unable to afford such support from law firms and regulatory consultancies.[193] Indeed, one of the senior law firm partners remarked that their lobbying arm would likely be too expensive for many green startups.[194] As such, although not traditionally a focus of pro bono for green startups, nonprofit legal aid groups should consider extending pro bono beyond legal transactional work to include policy advocacy and potentially even lobbying and regulatory work for qualifying green startups. PBI already counts lobbying for qualifying clients as pro bono,[195] and as noted above, APBCo's guidance suggests the importance of discretion for attorneys to offer pro bono legal help that is crucial to a qualifying client's survival, which they would otherwise be unable to afford.[196]

Such a pro bono policy may also address some of the concerns of lawyers that are otherwise reluctant to offer pro bono to green startups looking for venture financing. Given that only by addressing such regulatory and policy obstacles can many green startups better place themselves on a path to venture financing, more lawyers should consider offering pro bono regulatory and advocacy help before switching to other deferred fee and discounted arrangements. Moreover, pro bono from the public policy and lobbying practices of law firms also avoids displacing the paid transactional legal work of law firm partners focused on green startups. To the extent law firms' public policy and lobbying practices are less engaged in pro bono than other litigation and transactional law firm practices, law firm partners in these practice groups may also have greater motivation and capacity to begin taking on some meaningful pro bono work.

Boutique regulatory law firms, government affairs firms, regulatory consultancies, and even internal policy advocacy and lobbying teams at large climate tech investors[197] and policy advocacy teams at environmental nonprofits[198] can also consider offering a limited scope of free and/or especially discounted help to green startups in accelerator and incubator programs, similar to how some law firms currently offer green startups in these programs transactional legal help.

B. *Building New Coalitions for Policy Advocacy*

In addition to working directly with lawyers and the other entities mentioned above, green startups will also need to join larger coalitions, and lawyers should help guide them. Sustainable industry associations are one option, but as discussed by the CEOs of green startups during the focus group sessions, such associations are often too expensive for startups,[199] particularly considering that a member's ability to influence the association may depend on its ability

187. *See* Sustainable Materials CEO 1 Interview, *supra* note 19; Legal Aid Staff 1 Interview, *supra* note 26; CEO Survey, *supra* note 19.
188. *See* Sustainable Materials CEO 1 Interview, *supra* note 19; Legal Aid Staff 1 Interview, *supra* note 26; CEO Survey, *supra* note 19.
189. *See* Armitage et al., *supra* note 10, at 585.
190. *See* CEO Focus Group, *supra* note 27.
191. *See* Lawyer Focus Group, *supra* note 28.
192. As noted in the above section on legal and policy challenges related to regulatory compliance. *Cf.* Wroldsen, *supra* note 10, at 765 (arguing that lobbying was a key component of Tesla's successful strategy of creative legal framing of their disruptive innovation).
193. Startups can also work with regulatory consultancies in addition to, or instead of, law firms to address some regulatory issues. *See* CEO Focus Group, *supra* note 27.
194. *See* Lawyer Focus Group, *supra* note 28.
195. PBI Statement, *supra* note 141.
196. *See* APBCo Statement, *supra* note 77, at 4.
197. *See, e.g.*, Breakthrough Energy, *Our Team: U.S. Policy and Advocacy*, https://breakthroughenergy.org/our-approach/our-team/?team=US+Policy+and+Advocacy (last visited Nov. 9, 2023).
198. *See, e.g.*, Environmental Defense Fund, *Advocacy: Securing Vital Environmental Protections*, https://www.edf.org/advocacy (last visited Nov. 9, 2023).
199. *See* CEO Focus Group, *supra* note 27.

to pay.[200] To the extent that the interests of green startups with newer, more sustainable, and advanced technology do not align with the interests of older, more established sustainable businesses, green startups cannot otherwise rely on these incumbent sustainable industry trade groups to best advocate on their behalf. Instead, green startups and their lawyers should seek out existing policy advocacy groups that cater to green startups, as well as support the growth of these groups and develop new ones.

One potentially suitable policy advocacy organization for green startups mentioned during the focus group sessions is Environmental Entrepreneurs (E2), the lobbying arm of the environmental nonprofit Natural Resources Defense Council.[201] E2 counts the former CEO of the largest climate tech incubator in North America, Greentown Labs,[202] among its members[203] and helped to pass California's low-carbon fuel standard to promote sustainable innovation.[204] Some of the largest climate tech investors are also engaging in ambitious policy advocacy efforts,[205] while new climate tech venture firms spring up that offer policy advocacy as a key part of their value offering for their portfolio companies.[206] In addition, during the focus group sessions, lawyers brought up the climate solutions and social impact-focused accelerator Elemental Excelerator,[207] which runs a policy lab to address precisely this issue—better support for green startups, as well as community activist partners, to engage in policy advocacy.[208] The many other accelerators with green startup cohorts should consider emulating Elemental Excelerator's example.

Climate tech venture firms should consider not only collaborating, but also offering their financial backing to an alliance of green startups, creating a shared resource for their portfolio companies for effective policy advocacy. Given the financial power of the climate tech venture space,[209] such an alliance could prove especially influential. All of the above actors could further consider either joining or collaborating with E2, if they are not already. Lawyers who have played a key role in helping to form and support the policy advocacy efforts of other sustainable industry trade associations, sometimes behind the scenes,[210] could offer their support here as well, in particular, as one lawyer mentioned during the focus group sessions, helping any such trade groups avoid running afoul of antitrust laws.[211]

Green startups, accelerators, climate tech investors, and lawyers should also consider to what extent existing coalitions can be leveraged, or new ones can be formed, with industry-incumbent potential customers who stand to benefit from their sustainable technology. The above renewable energy storage CEO's technique of working with industry-incumbent customers to advocate for a new regulatory standard to account for their technology could potentially be scaled up to work with larger coalitions. The Clean Energy Buyers Association (CEBA), for instance, includes almost 100 Fortune 500 companies,[212] has been involved in 93% of clean energy transactions since 2014,[213] and plays an active role in addressing policy and regulatory barriers for clean energy technology.[214]

Perhaps similar coalitions could be formed with large industry incumbents interested in purchasing sustainable materials from green startups, for instance. As discussed in the focus group sessions, lawyers played a role in the formation of CEBA,[215] and could continue to play a role in building coalitions with CEBA. Lawyers could also collaborate with other industry incumbents looking to purchase sustainable products and services in other categories.

C. *Navigating and Strengthening Green Standards*

One important advocacy goal will be to improve upon existing and set new sustainable standards, certifications, and labels to properly recognize the sustainability benefits of a green startup's product and service offerings and to distinguish them from those of greenwashing competitors. In the focus group discussions, the law firm partners discussed how lawyers play an important role in advising green startups and working with other stakeholders to help set those standards.[216] In addition to engaging in advocacy, green startups will also need to keep attuned to the continued evolution of existing, and the development of new, sustainability standards to learn how best to navigate them. Both green startup CEOs and law firm partners discussed how lawyers have an important role to play in helping green startups navigate these standards to limit potential liability,[217] with lawyers adding how they can also share

200. Sustainability industry associations offer different tiers of membership, presumably based on ability to pay. *See, e.g.*, American Council on Renewable Energy, *Membership Opportunities*, https://acore.org/membership-opportunities/ (last visited Nov. 9, 2023).
201. *See* CEO Focus Group, *supra* note 27.
202. Greentown Labs, *The Largest Climatetech Startup Incubator in North America*, https://greentownlabs.com/about/ (lasted visited Nov. 9, 2023).
203. *See* E2, *Meet Our Members*, https://e2.org/our-members/ (lasted visited Nov. 9, 2023).
204. E2, *About*, https://e2.org/about/ (last visited Nov. 9, 2023).
205. *See, e.g.*, Breakthrough Energy, *Our Work: Policy and Advocacy*, https://breakthroughenergy.org/our-work/us-policy-and-advocacy/ (last visited Nov. 9, 2023).
206. *See, e.g.*, Overture VC, *Home Page*, https://www.overture.eco/ (last visited Nov. 9, 2023).
207. *See* Lawyer Focus Group, *supra* note 28.
208. Elemental Excelerator, *Elemental Policy Lab: Meet the Moment, Build the Future*, https://elementalexcelerator.com/elemental-policy-lab/ (lasted visited Nov. 9, 2023).
209. *Cf.* Press Release, PwC, More Than One Quarter of All Venture Capital Funding Is Going to Climate Technology, With Increased Focus on Technologies That Have the Most Potential to Cut Emissions (Nov. 3, 2022), https://www.pwc.com/gx/en/news-room/press-releases/2022/state-of-climate-tech-report-2022.html.
210. *See* Lawyer Focus Group, *supra* note 28.
211. *Id.*
212. CEBA, *CEBA Members*, https://cebuyers.org/about/ceba-members/ (lasted visited Nov. 9, 2023).
213. *Id.*
214. *Cf.* CEBA, *Advance Energy Policy*, https://cebuyers.org/solutions/advance-energy-policy/ (lasted visited Dec. 5, 2023).
215. *See* Lawyer Focus Group, *supra* note 28; Sarah Golden, *The Renewable Energy Buyers Alliance Is Now the Clean Energy Buyers Alliance*, GreenBiz (Nov. 18, 2021), https://www.greenbiz.com/article/renewable-energy-buyers-alliance-now-clean-energy-buyers-alliance.
216. *See* Lawyer Focus Group, *supra* note 28.
217. *See* CEO Focus Group, *supra* note 27; Lawyer Focus Group, *supra* note 28.

their experiences from working across different startups (to the extent allowed) and with organizations with expertise in developing and improving these standards.[218]

As separately noted by a green startup CEO and a senior law firm partner in the focus group discussions, coming to a uniform set of sustainability standards will be hard.[219] One potential new federal rule for unifying standards mentioned by the senior law firm partners[220] was the Securities and Exchange Commission's (SEC's) proposed rule that would require companies publicly traded in the United States[221] to make climate-related disclosures.[222] Such disclosures would include the company's greenhouse gas emissions and climate-related financial risk, as well as the company's climate-related goals and plans, if any, including for reducing its greenhouse gas emissions.[223] Assuming that the rule remains largely intact following anticipated significant litigation challenges after its promulgation,[224] the rule could prove the strongest force yet for uniform sustainability standards in the United States.

Similarly, at the state level, California passed two new laws in October 2023 that require business entities doing business in California with more than $1 billion in annual revenue to publicly disclose their greenhouse gas emissions, and with more than $500 million in annual revenue to publicly disclose their climate-related financial risk, respectively.[225] Although green startups are, in their early stages, unlikely to fall under the direct purview of either the SEC's proposed rule or the new California laws, the downstream effects from interacting with large companies targeted by the rule and these laws could help to boost uniformity of standards in the United States. The new SEC rule and the California laws present new and evolving standards for green startups, with the help of lawyers and industry coalitions, to navigate and attempt to influence.

Green startups will also need to stay aware of other new SEC rules aimed at setting uniform sustainability standards. The SEC adopted new amendments to the Names Rule in September 2023, for instance, that require investment funds whose names suggest an environmental thematic investment focus to invest "at least 80% of the value of their assets" consistent with that focus.[226] These amendments further require that funds review their performance against this requirement "at least quarterly" and, when they fall out of compliance, to get back into compliance within 90 days.[227] While such rules and regulations may be welcome for addressing greenwashing, green startups should also be wary of potential unintended detrimental effects.

By way of example, in spite of overall high levels of investment in climate tech ventures, there has been a recent, troubling trend of dramatically decreasing investment in early-stage climate tech ventures, for which a number of investors (prior even to the SEC's September 2023 amendments to the Names Rule) have blamed onerous ESG reporting requirements such that "funds targeted at earlier funding rounds may not have the economies of scale to cover the transaction costs."[228] Such a risk is an area worthy of further inquiry and monitoring by green startups, their attorneys, and their other allies in their advocacy efforts.

If and until the SEC climate-related disclosure rule comes into effect, and until 2026 when companies are required to disclose under the California laws,[229] lawyers brought up another less powerful force for setting uniform standards—guidance from the Federal Trade Commission (FTC).[230] Since the early 1990s, the FTC has been aware of the problems mentioned by green startup CEOs of greenwashing companies using vague terms suggesting sustainable impact.[231] In response to these and other deceptive marketing claims, the FTC has the authority to promulgate both legally binding trade regulations and nonbinding administrative guidance for industry.[232] However, legally binding trade regulations, such as those that would govern deceptive greenwashing marketing claims, can take as long as a decade to promulgate.[233] In the meantime, the FTC may have to largely rely on its nonbinding administrative guidance for industry—the FTC's Guides for the Use of Environmental Marketing Claims (Green Guides[234])—to address corporate greenwashing.

Even though the Green Guides are nonbinding, the FTC has the option to respond to greenwashing violations as described in the Green Guides with enforcement actions under §5 of the FTC Act.[235] In addition, many states have incorporated the Green Guides into state consumer protection statutes.[236] The National Advertising Division (NAD) of the Better Business Bureau, which has been able to effec-

218. *See* Lawyer Focus Group, *supra* note 28.
219. *See* CEO Focus Group, *supra* note 27; Lawyer Focus Group, *supra* note 28.
220. *See* Lawyer Focus Group, *supra* note 28.
221. The proposed rule applies to "registrants" or entities required to register with the SEC. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 (proposed Apr. 11, 2022) (to be codified at 17 C.F.R. pts. 210, 229, 232, 239, 249). Entities that are required to register with the SEC include those that have an initial public offering (IPO) of their securities, otherwise list their securities on a securities exchange, or have total assets worth more than $10 million and a class of equity securities held by either at least 2,000 people or at least 500 people who are not credited investors, subject to certain exemptions. *See* Securities Act of 1933, 15 U.S.C. §77a; Securities and Exchange Act of 1934, 15 U.S.C. §78c(a).
222. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334.
223. *Id.*
224. Jacqueline M. Vallette & Kathryne M. Gray, *SEC's Climate Risk Disclosure Proposal Likely to Face Legal Challenges*, Harv. L. Sch. F. on Corp. Governance (May 10, 2022), https://corpgov.law.harvard.edu/2022/05/10/secs-climate-risk-disclosure-proposal-likely-to-face-legal-challenges/.
225. Cal. Health & Safety Code §38532 (2023); *id.* §38533.
226. Press Release, SEC, SEC Adopts Rule Enhancements to Prevent Misleading or Deceptive Investment Fund Names (Sept. 20, 2023), https://www.sec.gov/news/press-release/2023-188.
227. *Id.*
228. *State of Climate Tech 2022: Overcoming Inertia in Climate Tech Investing*, *supra* note 5.
229. Cal. Health & Safety Code §38532 (2023); *id.* §38533.
230. *See* Lawyer Focus Group, *supra* note 28.
231. *See* Perrin Cooke, *Green Guide Gaps: Expanding FTC Authority Over Low-Carbon Marketing Claims*, 39 Colum. J. Env't L. 105, 120-21 (2014).
232. *See id.* at 114.
233. *See id.* at 115.
234. Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766, 77767-68 (Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260).
235. *See* Cooke, *supra* note 231, at 122.
236. *See id.* at 118-19, 126-27.

tively pressure companies to comply with its directives with the direct or implicit threat of referring its complaints to the FTC or other federal agencies, also uses the Green Guides to address greenwashing advertising claims.[237] As such, it will be important for green startups to seek to incorporate into the Green Guides the sustainability standards most relevant to their space, and most accurate for measuring sustainable impact.

The most recent revision of the Green Guides in 2012, for instance, offered "specific guidance regarding the use of claims about carbon offsets and renewable energy,"[238] even while definitions for such standard terms as "sustainable" remain absent.[239] The FTC is currently in the process of revising the guides again, following a public comment deadline of April 24, 2023.[240] The federal agency sought public feedback on such relevant questions as how the Green Guides could be modified to increase benefits and reduce compliance cost for business and for small businesses in particular[241]; what modifications should be made to account for changes in relevant technology[242]; what greenwashing marketing claims are not currently covered[243]; with what international laws or standards should the Green Guides consider harmonizing[244]; whether or not the FTC should consider issuing binding rules to address greenwashing[245]; and whether or not and how the FTC should consider revising its guidance of environmental marketing claims regarding such terms as "energy efficiency," "recyclable," and "biodegradable."[246] Such policy topics are ones that green startups, their attorneys, and their other allies may want to actively monitor and attempt to influence.

In the focus group discussions, the CEO of a sustainable materials startup emphasized their view that sustainability standards are mainly held back not by legal and policy obstacles, but by the sustainability community's indecision regarding which standard to adopt and the fact that much of the relevant science is still being developed.[247] While acknowledging that for some sustainability claims there may still be too much uncertainty in the scientific community for adoption in the Green Guides, greenwashing claims where there is stronger scientific consensus should and still can be addressed by the Green Guides.[248]

Other potential advocacy goals could include additional resources to allow the FTC to more frequently revise the Green Guides and increase enforcement action going forward,[249] which has dwindled in recent years.[250] In addition, green startups could also seek to add language to the Green Guides that offers guidance for interpreting vague language under §43 of the Lanham Act, which "applies to trademark issues and false advertising,"[251] to better support private rights-of-action by companies against their greenwashing competitors.[252] To the extent that influencing the Green Guides proves too challenging, green startups can aim to have the relevant state laws extend beyond the Green Guides to incorporate adequate sustainability standards, along with legal processes to allow for relief and protection.

Green startups should also be aware of global coalescing around international sustainability standards that may foreshadow future U.S. standards, if not also directly impact U.S. markets. One of the most striking comments during the focus group sessions came from a law firm partner who argued, contrary to the viewpoints expressed by many green startup CEO participants during the primary research, that there is already significant coalescence around uniform standards for sustainability.[253] In particular, the partner pointed toward global coalescing by investment banks and public equity markets around the sustainable initial public offering (IPO) standards established by the International Sustainability Standards Board,[254] whose creation was announced by the influential International Financial Reporting Standards Foundation at the United Nations' 26th Conference of the Parties (COP26) climate summit.[255] Indeed, major investment banks are actively advising emerging public companies about how to comply with global ESG standards, so as not to lose out on record U.S. sustainable investing when they hold an IPO.[256]

The law firm partner also noted that new regulations in Europe, such as Article 9 (on financial products with a sustainable investment objective) of the European Union's (EU's) Sustainable Finance Disclosure Regulation,[257] are

237. Claire Fischer, *Is Twitter the New FTC and EPA? Publicized Private Action as the Anti-Greenwashing Mechanism in Modern Society*, 33 Geo. Env't L. Rev. 315, 324 (2021).
238. *Id*. at 323.
239. *Id*. at 320. Rather than advocate that the FTC define such broad terms as "sustainability," however, it may instead be more prudent to advocate that the FTC make clearer "that companies that use such words and phrases broadly should prominently explain what this word means in that context and offer substantiation for their claims." Carolyn Kennedy, *"Sustainable" Fashion's True Colors: A Proposal for "Restyling" the FTC Green Guides*, 53 ELR 10751, 10766 (Sept. 2023), https://www.elr.info/articles/elr-articles/sustainable-fashions-true-colors-proposal-restyling-ftc-green-guides.
240. Lesley Fair, *FTC Greenlights Green Guides Comment Extension*, FTC: Bus. Blog (Jan. 31, 2023), https://www.ftc.gov/business-guidance/blog/2023/01/ftc-greenlights-green-guides-comment-extension.
241. Guides for the Use of Environmental Marketing Claims, 87 Fed. Reg. 77766, 77767-68 (Dec. 20, 2022) (to be codified at 16 C.F.R. pt. 260).
242. *Id*. at 77768.
243. *Id*. at 77767.
244. *Id*. at 77768.
245. *See id*. at 77766.
246. *See id*. at 77768-69.
247. *See* CEO Focus Group, *supra* note 27.
248. *See* Cooke, *supra* note 231, at 153-54.
249. *See* Fischer, *supra* note 237, at 332.
250. The FTC decreased enforcement action under the Green Guides from 28 cases in 2017 to one action in 2019. *Id*. at 326. Other advocacy goals could include encouraging the FTC to apply its own subjective analysis, instead of its perceived assessment of a consumer's analysis, to assess greenwashing claims, authority which the courts seem to have granted it. Cooke, *supra* note 231, at 153.
251. Fischer, *supra* note 237, at 324.
252. *See id*. at 324-25.
253. *See* Lawyer Focus Group, *supra* note 28.
254. *See id*.
255. Nadja Picard & Stuart Newman, *You Can't Spell IPO Without ESG*, PwC (Nov. 2, 2022), https://www.pwc.com/gx/en/issues/esg/publications/you-cant-spell-ipo-without-esg.html.
256. *See, e.g.*, Morgan Stanley Institute for Sustainable Investing, *supra* note 38; *3 ESG Essentials for Firms Looking to Go Public*, Morgan Stanley (Dec. 9, 2020), https://www.morganstanley.com/ideas/esg-companies-pre-ipos-spacs.
257. Parliament and Council Regulation 2019/2088, art. 9, O.J. (L 317) 1, 12-13 (EU).

playing a strong role in driving this coalescence,[258] including by having a significant impact on large global investors such as Kohlberg Kravis Roberts and Co. (KKR).[259] The partner added that such European regulations may influence future U.S. regulations.[260] The partner further added that some of the large accelerators are beginning to help startups prepare to meet these standards at earlier stages of development.[261]

Notably, the accelerator Y Combinator has been especially influential in leading widespread adoption of the new financial product the simple agreement for future equity (SAFE) among startups and their investors.[262] Y Combinator and other large accelerators, with support from lawyers and other stakeholders, can similarly help to promote the standardization and acceptance of sustainability standards and practices for green startups to help prepare them to conform with the increasingly accepted global standards for sustainable IPOs. As the law firm partner noted, much of the greenwashing in the United States may ultimately give way to such standards[263]—green startups need to prepare accordingly.

D. Leveraging Untapped Pipelines for Legal Help

Another potentially viable way to address greenwashing is litigation. Initiating lawsuits against greenwashing competitors, even if ultimately unsuccessful, can, through public communications, serve to tarnish the reputation of greenwashing competitors to deter the behavior.[264] Whether in this context or in a regulatory or transactional context, however, green startups may find it especially difficult to find law firm support when the opponent is a large company; senior staff at one legal aid nonprofit described how, when green startups come in with litigation requests, law firm participants are usually conflicted out.[265] In particular, the staff person noted one example of a green startup that signed a partnership agreement with a major company that chose ultimately not to pay the green startup for its services, but the startup had been unable to find a law firm because law firms had been conflicting out.[266]

Smaller local law firms and individual lawyers specializing in litigation may be less likely to work with such major companies, and thus less likely to be conflicted out than large corporate law firms. Additionally, as noted by the senior staff person, smaller local law firms and individual lawyers also do not have as strict pro bono criteria, and as such may be more willing to offer such services pro bono.[267] So long as green startups are willing to sign liability waivers to accept the risk posed by the less comprehensive liability coverage, which does not cover pro bono work, of these smaller law firms and individual lawyers,[268] these groups may offer viable alternatives.

Teams of lawyers at environmental nonprofits may also be unlikely to conflict out and are another potential source of support. Environmental nonprofits with teams of lawyers engaged in litigation against government and industry for polluting[269] and greenwashing should consider also developing teams of lawyers to litigate on behalf of green startups against powerful incumbents that would otherwise cause large corporate law firms to be conflicted out.

Another potentially promising, and largely untapped, pipeline for pro bono legal help is law school clinics.[270] Law school clinics, supervised by faculty attorneys, are also unlikely to be conflicted out from helping green startups in litigation against incumbents. Small law firms, individual lawyers, and teams of lawyers at environmental nonprofits could partner with law school clinics to build robust professional teams. Even focusing on intractable regulatory challenges for green startups could potentially provide a good semester or year-long project for law school clinics to offer pro bono to green startups that are otherwise unable to afford private legal help.

A number of law school clinics and projects already offer pro bono transactional legal help to early-stage startups and small businesses,[271] including at least a few with an explicit focus on serving startups that promote

258. *See* Lawyer Focus Group, *supra* note 28.
259. *See id.*; *see, e.g.*, *EU Sustainable Finance Disclosure Regulation*, KKR (Mar. 21, 2023), https://www.kkr.com/eu-sustainable-finance-disclosure-regulation.
260. *See* Lawyer Focus Group, *supra* note 28.
261. *See id.*
262. *See* Kyle Westaway, *Understanding SAFE Agreements: Benefits and Risks for Startups*, Forbes (Jan. 6, 2023), https://www.forbes.com/sites/kylewestaway/2023/01/06/understanding-safe-agreements-benefits-and-risks-for-startups/?sh=2febfd273433.
263. *See* Lawyer Focus Group, *supra* note 28.
264. Fischer, *supra* note 237, at 324-25.
265. Legal Aid Staff 1 Interview, *supra* note 26. The phrase "conflicting out" as used here refers to the industry rules governing lawyers that prevent them from representing a new client whose interests conflict with those of current or former clients. Model Rules of Pro. Conduct r. 1.7 (Am. Bar Ass'n, Discussion Draft 1983); *id.* r. 1.9.
266. Legal Aid Staff 1 Interview, *supra* note 26.
267. *Id.*
268. The senior pro bono staff person mentioned this as a potential drawback of working with smaller law firms, but stated that, from their experience, most of the green startups faced with this situation tended to be willing to sign the liability waiver. *Id.*
269. *See, e.g.*, Natural Resources Defense Council, *Litigation*, https://www.nrdc.org/about/litigation (last visited Nov. 9, 2023).
270. *See id.*
271. *See, e.g.*, Yale Law School's Entrepreneurship and Innovation Clinic, *Home Page*, https://eic-yls.org/ (last visited Nov. 9, 2023) [hereinafter Yale E&I Clinic]; Harvard Law School, *Transactional Law Clinics*, https://hls.harvard.edu/clinics/in-house-clinics/transactional-law-clinics/ (last visited Nov. 9, 2023) (includes the Business and Non-Profit Clinic and the Community Enterprise Project); Harvard Law Entrepreneurship Project, *Home Page*, https://clinics.law.harvard.edu/hlep/ (last visited Nov. 9, 2023) [hereinafter HLEP]; Columbia Law School, *Entrepreneurship and Community Development Clinic*, https://www.law.columbia.edu/academics/experiential/clinics/entrepreneurship-and-community-development-clinic (last visited Nov. 9, 2023) [hereinafter Columbia Entrepreneurship Clinic]; New York University School of Law, *Entrepreneurship Clinic*, https://www.law.nyu.edu/academics/clinics/entrepreneurship (last visited Nov. 9, 2023) [hereinafter NYU Entrepreneurship Clinic]; Berkeley Law, *New Business Community Law Clinic*, https://www.law.berkeley.edu/experiential/clinics/new-business-community-law-clinic/ (last visited Nov. 9, 2023) [hereinafter Berkeley Business Clinic]; University of Michigan Law School, *Zell Entrepreneurship Clinic*, https://michigan.law.umich.edu/academics/experiential-learning/clinics/entrepreneurship-clinic-0 (last visited Nov. 9, 2023) [hereinafter Michigan Entrepreneurship Clinic]; Georgetown Law School, *Social Enterprise and Nonprofit Clinic*, https://www.law.georgetown.edu/experiential-learning/clinics/our-clinics/social-enterprise-and-nonprofit-clinic (last visited Nov. 9, 2023) [hereinafter Georgetown Enterprise Clinic].

positive societal impacts,[272] and a number of which, in line with APBCo's guidelines, explicitly focus on low-income entrepreneurs and startups that are not yet able to afford legal help.[273] More law school clinics, however, should consider explicitly focusing on startups run by low-income entrepreneurs that are unable to afford legal help, as well as on social enterprises and other impact-focused startups, with an emphasis focused on those that serve disadvantaged populations.

As regards what kinds of transactional legal help law school clinics should consider offering green startups, green startup CEOs in the focus group sessions indicated that they would be comfortable with law school clinics offering them help on such topics as NDAs and licensing agreements.[274] Law school clinics can consider focusing on these and similarly constrained legal issues, such as incorporation, that do not require as long of a time frame or as deep of a relationship as other legal work, such as IP. For green startups unable to afford paid legal help and forced to resort to third-party legal services platforms, or faced with low-quality pro bono legal help, such support from law school clinics may be welcome. Further, to the extent that law school clinics that currently offer legal work on IP also provide robust training and support for law students to offer strong—even top-of-the-line—legal help in this area, green startups can consider if and when receiving such support from law school clinics serves their best interests.

For their part, law firms can welcome such participation from law school clinics as a cost-effective way to train and recruit legal talent, in particular given that one of the major motivations for law firms to engage in pro bono is to provide a training opportunity for their associates.[275] Particularly given that the curriculum of many law schools largely focuses on litigation, offering only limited coverage of legal transactional work,[276] law school clinics can fill a gap in training by offering pro bono legal transactional work. Some law school projects[277] and clinics[278] already partner with affiliate attorneys. Law firms and law school clinics can consider initiating or expanding such engagements.

E. Standardizing Social Enterprise Law

Social enterprise corporate forms are another important way for green startups to prove their sustainable impact, as well as to protect against litigation risk from shareholders, but will remain out of reach unless the supply of attorneys qualified in helping to establish and govern them increases. That demand among impact-minded startups has soared to the point where the leading social enterprise lawyers are compelled to offer a different form of "pro bono support"—uncompensated help to other attorneys—to help lawyers learn best practices. It is time for law schools and the American Bar Association (ABA) to step up. Law school clinics and programs that teach law students social enterprise law are important steps forward, and more law schools should follow suit, but mid-career attorneys also need help.

In discussing the issue during the focus group sessions, one pro bono counsel recommended an "executive M.B.A."-type program, but for attorneys to learn social enterprise law.[279] The pro bono counsel's suggestion is well-taken—law schools that offer executive education programs[280] should consider adding social enterprise law to the mix; law schools that offer social enterprise law to students[281] should consider expanding their pool of students to mid-career attorneys; and law schools without either should consider offering both. Demand from businesses means demand from law firms and attorneys that may not only offer law schools additional revenue streams, but would also serve an important societal need.

The ABA, for its part, already has a Joint Committee on Social Entrepreneurship and Social Benefit Entities and has long recognized the need to help attorneys learn more about social enterprise law and address the many legal gray areas in the field,[282] outdone only by the organization's even longer and stronger commitment to promoting sustainable development.[283] Even to the extent the ABA has, in the past, offered some sessions on social enterprise law, both the ABA and other local bar associations should increase their training opportunities to address the dearth of social enterprise lawyers in the face of unprecedented and accelerating demand from green startups and other social impact-minded startups.

272. *See, e.g.*, Yale E&I Clinic, *supra* note 271 ("When taking on clients, [the Clinic] . . . give[s] a preference to ventures that have a positive impact on society."); Georgetown Enterprise Clinic, *supra* note 271 (The clinic serves social enterprises that include select small businesses that "seek to maximize internal and external positive impact, including social and environmental impact.").

273. *See, e.g.*, Columbia Entrepreneurship Clinic, *supra* note 271 (The Clinic serves startups run by "low- and moderate-income entrepreneurs and fledgling businesses."); NYU Entrepreneurship Clinic, *supra* note 271 (The Clinic serves "low income and moderate income entrepreneurs and community based organizations in New York City."); Berkeley Business Clinic, *supra* note 271 (The Clinic serves a diverse array of local, low-income entrepreneurs.).

274. *See* CEO Focus Group, *supra* note 27.

275. *See* Cummings & Rhode, *supra* note 132, at 2386.

276. *See* Stephanie Hunter McMahon, *What Law Schools Must Change to Train Transactional Lawyers*, 43 Pace L. Rev. 106 (2022).

277. *See, e.g.*, HLEP, *supra* note 271 (The Project matches "entrepreneurs with teams of several Harvard Law School students and an attorney advisor who work together to answer legal questions.").

278. *See, e.g.*, Michigan Entrepreneurship Clinic, *supra* note 271 (The Clinic partners with affiliate attorneys and explicitly lists recruiting "access to top U-M law students seeking to work in the corporate and IP fields after graduation" as one of the advantages of participation by affiliate attorneys.).

279. Lawyer Focus Group, *supra* note 28.

280. *See, e.g.*, Harvard Law School, *Executive Education*, https://hls.harvard.edu/executive-education/ (last visited Nov. 9, 2023).

281. *See, e.g.*, New York University Law School, *Law & Social Entrepreneurship at NYU*, https://www.law.nyu.edu/LawSocialEntrepreneurship (last visited Nov. 9, 2023).

282. *See, e.g.*, Michael Vargas, *Our Mini-Theme: An Introduction to Benefit Corporations*, Bus. L. Today (July 20, 2016), https://www.americanbar.org/content/dam/aba/publications/blt/2016/07/full-issue-201607.authcheckdam.pdf (ABA co-chair of the Joint Committee on Social Entrepreneurship and Social Benefit Entities describing how most attorneys do not have the knowledge to counsel benefit corporations in spite of growing demand from entrepreneurs to adopt benefit corporations).

283. *See* John C. Dernbach et al., *The Growing Importance of Sustainability to Lawyers and the ABA*, A.B.A. (July 1, 2013), https://www.americanbar.org/groups/environment_energy_resources/publications/trends/2012_13/july_august/the_growing_importance_of_sustainability_to_lawyers_and_the_aba/.

In addition to classes, rather than lawyers debating legal gray areas in social enterprise law in an ad hoc fashion when they arise in the heat of deals, the ABA should consider inviting the leading experts in social enterprise law to discuss these gray areas in a more structured setting and offer a more comprehensive set of potential resolutions. Such experts could include, for instance, practitioners, the drafters of state social enterprise statutes of the most accepted social enterprise corporate forms, and leading current or former judges responsible for interpreting the laws governing those social enterprise corporate forms, such as former Delaware Supreme Court Chief Justice Leo Strine.[284]

Outside the legal world, even more so than for sustainable standards, accelerators with green startups and other social impact-minded startups could potentially have a powerful impact driving the standardization and acceptance of social enterprise corporate forms. The support and guidance of leading social enterprise law attorneys, and even the ABA, in this regard, could offer an especially large step forward in driving widespread standardization and acceptance of social enterprise corporate forms, easing investor concerns and lowering legal and other costs for the green startups and other startups that adopt these forms.

F. *Implementing Green Impact-Based Executive Compensation Structures*

For green startups looking to prove their sustainable impact, whether from use of sustainable standards or incorporating as a social enterprise, to obtain capital from sustainably minded investors, executive compensation plans that align with such impact is another promising tool to consider. During the focus group sessions, one senior law firm partner brought up that while adopting a social enterprise corporate form is one way to prove sustainable impact to investors, "it only gets you so far," and green startups should also consider such compensation structures, emphasizing that they are something that they think "the majority of climate tech investors are looking at."[285] Indeed, investor demand for ESG more broadly has seen a growing trend of large companies across the United States increasingly linking executive pay to not just shareholder returns, but also social and environmental impact,[286] and there are a range of executive incentive programs with ESG metrics to consider.[287] Legal help on executive compensation and benefits can be increasingly employed for this purpose.

G. *Updating Pro Bono Eligibility Guidelines*

Whether for designing sustainable impact-linked executive compensation plans or structuring social enterprise corporate forms, significant legal expenditures may continue to prevent green startups from growing rapidly enough to build the sustainable economy in time to adequately address the climate crisis and related ecological crises, even with the tapping of new pipelines for pro bono legal help. PBI and APBCo should consider revising and clarifying their pro bono criteria to help law firms more realistically assess the financial situation of green startups. One revision would be to specify that not only total levels of funding, but also restrictions placed on that funding should be assessed when determining the ability of a green or other startup (including social enterprise) to pay for legal help.

The CEO of a clean energy storage startup, for instance, noted that most of what they had raised was grants and philanthropic funding that came with restrictions preventing them from spending it on certain expenses, including legal services.[288] As a result, of that funding, only about 20% was available for spending on legal services, such that the startup may appear much more able to afford legal help than it actually is.[289] During the focus group sessions, one of the senior law firm partners remarked that when assessing the pro bono eligibility of a green nonprofit they take into account "origination of the funding," whether grant or otherwise.[290] Currently, neither APBCo's[291] nor PBI's[292] guidance mentions consideration of "origination of funding" in its criteria for assessing a startup's ability to afford legal help. Both organizations should.

Another revision that PBI and APBCo should consider in assessing a startup's ability to afford legal help is what industry sector and technology the startup focuses on. APBCo already directs law firms to take into account geographic differences when assessing whether or not a startup, including the individuals running it, can afford legal help.[293] APBCo should, by the same logic, account for differences in funding required for different industries and technologies, particularly given the especially long timelines for commercialization faced by green startups in developing sustainable hardware that has often held them back in investor environments ill-suited to support their growth.

As noted above, the CEO of one especially capital-intensive sustainable materials startup described how their pilots would likely require more than $50 million in financing.[294] Similar to APBCo's recommendation of the U.S. Department of Housing and Urban Development's regional guidelines to account for regional differences in income, the CEO recommended that industry guidelines

284. Chief Justice Strine wrote an article promoting Delaware PBCs. Strine, *supra* note 87. The Delaware PBC is one of the most widely accepted and promising types of social enterprises. *See* Lawyer Focus Group, *supra* note 28.
285. Lawyer Focus Group, *supra* note 28.
286. *See* Lydia Beyoud, *Executive Pay Tied to ESG Goals Grows as Investors Demand Action*, Bloomberg L. (Mar. 14, 2022), https://news.bloomberglaw.com/esg/executive-pay-tied-to-esg-goals-grows-as-investors-demand-action.
287. *See* James F. Reda, *Introducing ESG Metrics Into Executive Incentive Programs*, 38 J. Comp. & Benefits 11, 12 (2022).
288. Energy Storage CEO 1 Interview, *supra* note 23.
289. *See id.*
290. *See* Lawyer Focus Group, *supra* note 28.
291. *See* APBCo Statement, *supra* note 77, at 3-4, 12, 23.
292. *See* PBI Statement, *supra* note 141.
293. *See* APBCo Statement, *supra* note 77, at 11-12.
294. *See* CEO Focus Group, *supra* note 27.

could be developed by analyzing average funding levels by industry sector and technology, potentially using data from such sources as PitchBook.[295] Taking on such a project would allow APBCo and other nonprofit legal aid groups to better guide law firms in assessing a startup's ability to afford legal help. Both organizations could at least start by explicitly referencing this factor to provide law firms with better direction.

Outside of revising eligibility criteria, another important pro bono issue that law firms and nonprofit legal aid groups can address is the difficulty of timing pro bono help to address the evolving needs of green startups. Aside from offering caps on hours of pro bono legal work inside of a defined scope of legal services, another possible solution would be for more nonprofit legal aid groups, as per the suggestion of one pro bono counsel, to hire more full-time attorney staff.[296] Full-time attorney staff at nonprofit legal aid groups can not only help coordinate setting up pro bono clients with outside attorneys, but also collaborate on the legal work and even take over during the gaps between pro bono support from different law firms, or when a law firm otherwise finds itself under-resourced to continue offering pro bono to the green startup.

By better monitoring the work of law firms and stepping in as needed, such full-time attorney staff can also maintain better quality of legal help.[297] For legal matters in high demand from green startups but where such full-time attorney staff does not have sufficient expertise, they can help better coordinate with a wider array of law firms to identify which have the expertise, capacity, and interest in addressing which legal matters for which green startups. Even without the benefit of coordination from such full-time attorney staff, law firms could consider coordinating amongst themselves and with nonprofit legal aid groups in such a manner to better maintain higher-quality pro bono legal help for green startups.

H. Designing a Preferential Climate Solutions Legal Services Package

Traditional pro bono offerings are necessarily limited, given how far even existing pro bono offerings have fallen short in providing enough legal assistance to low-income Americans otherwise unable to afford it.[298] In recognition of this limitation, the critical importance of addressing the climate crisis and related ecological crises, and the especially long commercialization timelines that many green startups face, law firms should consider offering green startups a "preferential climate solutions package."[299]

As discussed by some of the law firm partners during the focus group sessions, a preferential climate solutions package could potentially consist of a hybrid of free and favorable discount offerings for green startups.[300] As noted by one law firm partner, considering that some law firm partners already offer a limited scope of free and especially favorable deferred and discounted arrangements for green startups in certain incubators and accelerators, why not expand such offerings to other, similarly deserving green startups more broadly?[301]

Law firms could, for instance, for even green startups aiming to eventually receive venture financing, consider offering even lower discounts and lower caps on deferred fees, along with longer deferral fee periods that only come due if and when the green startup receives funding to afford them, and are otherwise dropped if the green startup fails and folds before then. Law firms could even consider offering pro bono only for those more discrete items where quality of work and long-term relationship development is not as important, such as for NDAs, employment agreements, and incorporation, and save discounted and deferred fee arrangements for IP and other legal work where such relationship development is more important. By extending and standardizing the hybrid free and discounted legal fee arrangements to a wider array of green startups, perhaps law firms can finally, as one senior law firm partner put it, "light a bigger fire under sustainable innovation."[302]

IV. Conclusion

Since research for this Article began in early 2021, there have been momentous strides forward for building the sustainable economy, such as enactment of the Inflation Reduction Act.[303] And yet the latest Intergovernmental Panel on Climate Change report from March 2023 makes clear that even more ambitious efforts are needed, at even faster speeds and greater scale.[304] Green startups will play a leading role in this transition, and attorneys and nonprofit legal aid groups will play a crucial role in supporting them in their efforts. This Article hopes to provide recommendations to aid each of them, in turn, in their work to build the sustainable economy and secure our future.

295. *See id.*
296. *See* Lawyer Focus Group, *supra* note 28.
297. *See id.*
298. *See* Legal Services Corporation, *The Unmet Need for Legal Aid*, https://www.lsc.gov/about-lsc/what-legal-aid/unmet-need-legal-aid (last visited Nov. 9, 2023).
299. This term was used in the focus group session with the senior attorneys, pro bono counsel, and pro bono staff. Lawyer Focus Group, *supra* note 28.
300. *See id.*
301. *See id.*
302. *Id.*
303. *See* Inflation Reduction Act of 2022, Pub. L. No. 117-169 §10001, 136 Stat. 1818.
304. *See* IPCC Core Writing Team, *Summary for Policymakers*, *in* Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II, and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 1, 10, 12, 15, 20-21, 25, 27, 30, 32 (Hoesung Lee & José Romero eds., IPCC 2023).

Appendix 1. Literature Survey in Greater Detail

Although limited in its coverage of the topic, the existing literature may nonetheless offer some relevant insight regarding legal and policy challenges facing U.S. green startups. One of the most common themes of legal and policy challenges for green startups that is discussed in the literature is regulation that is complex, burdensome, and generally favorable to incumbents over new entrants. Michael Lenox and Jeffrey York's literature survey of the topic of environmental entrepreneurship globally, for instance, cites Robert Isaak's argument that government bureaucracy can be inhibitive of environmental entrepreneurship,[305] while interview-based studies of green startups in Sweden[306] and Poland,[307] respectively, both identify regulatory challenges as some of the most critical facing green startups in these countries. A 2016 EU government survey of sustainable innovation by small and medium sized enterprises (SMEs) across the EU even highlights "complicated administrative and legal procedures . . . [and the] costs associated with compliance to regulations and standards" as some of the most prevalent, key barriers for sustainable innovation by EU startups, ahead of even "difficulties in access to financing."[308] This Article's primary research findings similarly identify regulatory compliance as one of the most critical themes of legal and policy challenges facing U.S. green startups. As such, the presence of this theme in the literature both offers some validation of this Article's primary research findings and suggests that a deeper dive into the analysis of this theme in the literature might provide relevant background for better understanding these findings.

LeSage's piece offers some of the most relevant insight regarding the regulatory challenge, focusing on regulatory obstacles to U.S. green startups.[309] Some of LeSage's analysis verifies findings similar to those in the aforementioned 2016 EU survey in the U.S. context—for instance, in noting how one of the key ways in which regulations burden small sustainable businesses is by the direct and indirect costs these businesses are forced to bear to comply with these regulations.[310] LeSage also reaches similar conclusions to the findings of Paul Mansberger and Filip Projic's interview study of environmental entrepreneurs in Sweden; LeSage observes that U.S. politicians often aim environmental regulations at large companies "with little or no regard for how these laws affect small businesses,"[311] while Mansberger and Projic's study cites interviews with entrepreneurs who describe how complying with existing environmental regulations can ironically serve as a barrier to advancing sustainable businesses that are more environmentally friendly than incumbent industries currently in compliance with those regulations.[312] Mansberger and Projic's study, however, offers an important caveat—green startup interviewees also noted how, as might be expected, environmental laws can, in many other instances, increase demand for sustainable solutions among companies and other potential customers of green startups.[313]

Global primary research has also identified regulatory challenges as some of the most prevalent, key obstacles facing not just green startups, but also startups more generally, with "[a]t least one comprehensive global study covering more than 3600 entrepreneurs in sixty-nine countries [that] found that entrepreneurs in developed countries identified five out of six major obstacles for doing business as related to regulations."[314] Even so, Joshua Macey and Jackson Solavaara offer an example of how regulatory challenges appear to have had a more dramatic effect in the clean electricity energy space than in many other industries; Macey and Solavaara note how heavy regulation of utility electricity prices to consumers depresses innovation in the U.S. electricity market, driving down the rate at which investor-owned utilities invest their revenue into research and development far below not only those of companies in industries such as pharmaceuticals and computer manufacturing, but also those of companies in other, less technology-dependent industries.[315] Such context is helpful for understanding the extent to which green startup CEOs operating in the energy space, as discussed in the primary research findings, may be especially burdened by this challenge.

Another key theme of legal and policy challenges for green startups raised in both the primary research and the

305. Robert Isaak, *Globalisation and Green Entrepreneurship*, 18 Greener Mgmt. Int'l 80 (1997) (*cited in* Lenox & York, *supra* note 17, at 76).

306. A 2018 study by graduate students at Jönköping University International Business School cites interviews with Swedish environmental entrepreneurs describing how complying with environmental regulations can ironically serve as a barrier to advancing sustainable businesses that are more environmentally friendly than incumbent industries currently in compliance with these regulations. *See* Mansberger & Projic, *supra* note 17, at 31-32.

307. A 2019 study on sustainable entrepreneurship in the bioeconomy sector conducted by academics at the Kraków University of Economics in Poland cites interviewee companies that report both financing and regulatory issues as the main external factors inhibiting innovation in their sector. *See* Sołtysik et al., *supra* note 17.

308. As discussed in Urbaniec's literature survey of barriers facing green entrepreneurship where she cites this study. *See* Urbaniec, *supra* note 17, at 59:

> The key problems identified by the European SMEs—based on the results of research on "European SMEs and the Circular Economy" (European Union, 2016) mainly include: complex administrative and legal procedures (34%) and the costs associated with adapting to regulations and standards (32%) (European Union, 2016, p. 32). Slightly over one quarter of European companies mentioned difficulties in access to finances (27%), and at least one in five—lack of expertise (22%) or lack of human resources (21%).

(citing European Commission, Flash Eurobarometer 441, European SMEs and the Circular Economy 31 (2016), http://eco.nomia.pt/contents/documentacao/kh0216459enn-002.pdf).

309. Although LeSage uses the term sustainable "small businesses and microentreprenuers," which she defines as those with fewer than 500 employees and those with fewer than six employees, $35,000 or less in startup capital, and without access to financing from the traditional commercial banking sector, respectively, these definitions encompass green startups such that LeSage's analysis is relevant. LeSage, *supra* note 3, at 673-74.

310. *Id.* at 682.

311. *Id.* at 680-81.

312. Mansberger & Projic, *supra* note 17, at 36-37.

313. *Id.* at 30-31.

314. LeSage, *supra* note 3, at 682 (citing Aymo Brunetti et al., *Institutional Obstacles for Doing Business: Data Description and Methodology of a Worldwide Private Sector Survey* 21 (World Bank, Policy Research Working Paper No. 1759, 1997).

315. Macey & Salovaara, *supra* note 16, at 1198-99.

existing literature is challenges related to difficulty verifying sustainable impact. In particular, Mansberger and Projic describe how environmental entrepreneur interviewees in Sweden cited both a lack of clarity surrounding the legal definition of "sustainable" standards and differing standards in different countries as challenges.[316] Overall, however, this theme is otherwise much less explored by the existing literature than the regulatory challenge theme. This Article's primary research findings aim to help address this gap.

316. Mansberger & Projic, *supra* note 17, at 32-33.